112-183

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~686~~ 297

THE COUNTY COURT OF SCOTLAND COUNTY AND THE JUDGES THEREOF, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES EX REL. WILLIAM HILL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 4, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 636.

THE COUNTY COURT OF SCOTLAND COUNTY AND THE JUDGES THEREOF, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES EX REL. WILLIAM HILL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the March term, 1882, thereof, between The United States, *ex rel.* William Hill and The County Court of Scotland County and the Judges thereof, respondents, (No. 1153 & 1287,) a manifest error hath happened, to the great damage of the said respondents, The County Court of Scotland County and the Judges thereof, as by that complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 21st day of April, in the year of our Lord one thousand eight hundred and eighty-two (1882).

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.]

M. M. PRICE,
Clerk Circuit Court United States, Eastern District of Missouri.
By A. P. SELBY, *Deputy.*

Allowed by—
SAMUEL TREAT, *Judge.*

1½ *Return to Writ.*

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the *the* record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said circuit court, at office in the city of St. Louis, this 8th day of May, A. D. 1882.

[SEAL.]

M. M. PRICE, *Clerk of said Court.*
By A. P. SELBY, *Deputy Clerk.*

Endorsed: No. 1287. United States circuit court, eastern district of Missouri. U. S., *ex rel.* Wm. Hill, *vs.* County Court of Scotland County & Judges thereof. Writ of error to the circuit court of the U. S. east'n dist. of Missouri.

2 THE UNITED STATES OF AMERCIA,

To William Hill, relator in case (No. 1153 & 1287,) The United States *ex rel.* William Hill *vs.* The County Court of Scotland County, and the judges thereof, respondents, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein The County Court of Scotland County, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 21st day of April, in the year of our Lord one thousand eight hundred and eighty-two (1882).

SAMUEL TREAT,
Judge United States Circuit Court, Eastern District of Missouri.

I hereby waive service of the within citation, this 26th day of April, 1882.

F. T. HUGHES,
Att'y for Def't in Error.

Endorsed: 1287. United States circuit court, eastern district of Missouri. U. S. *ex rel.* William Hill *vs.* County Court of Scotland County judges thereof. Citation. Filed April 21, 1882. M. M. Price, clerk.

3 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court of the United States in and for said Eastern District of Missouri.

Be it remembered, that on the 1st day of March, A. D. 1881, there was filed in the circuit court of the United States in and for the eastern district of Missouri, a certain information for mandamus, in words and figures following, to wit:

4 UNITED STATES OF AMERICA, } Set:
Eastern District of Missouri, }

To the honorable judges of the circuit court of the United States in and for the eastern district of Missouri:

Now comes Wm. Hill and relates to the court that he is a citizen of the State of Illinois, and that the county of Scotland is a mu-

nicipal corporation, created by, and a citizen of, the State of Missouri, whose financial affairs are managed by a county court composed of judges who are citizens of said State: that on the 23d day of April, A. D. 1880, said relator recovered in the circuit court of the United States in and for the eastern district of Missouri a judgment against the said county of Scotland for the sum of $45,491 dollars, with interest at 6 per cent. per annum, and costs taxed at $—— dollars: that said judgment was recovered upon coupons detached from bonds issued by the said county in payment for stock subscribed to the Missouri, Iowa and Nebraska Railway Company; that a demand has been made on said county court and the judges thereof to pay the said judgment, interest, and costs, or that they levy and cause to be collected upon all the real estate and personal property in said county subject to taxation a tax, according to law, for the purpose of paying the said judgment, interest, and costs, and to pay the same, and that said demand has been refused; that said county has no property out of which said judgment, interest, and costs can be levied, and that the said relator has no other adequate remedy at law.

Wherefore the relator prays the court to order and issue a writ of mandamus, directed to the said county court of Scotland county, and to Benj. F. Bourne, Riley Gale, and Ephraim E. Sparks, the judges thereof, commanding them to forthwith levy and cause to be collected upon all the real estate and personal property in said county subject to taxation, a tax for the payment of said judgment, with interest and costs, including the costs of this proceeding, and to pay the same according to law.

By A. J. BAKER &
F. T. HUGHES, *Attorneys.*

I, A. J. Baker, on oath state that I am attorney for the relator, and that the matters and things alleged in the above information are true, as I verily believe.

A. J. BAKER.

Subscribed and sworn to before me, this 1st day of March, A. D. 18—.

A. P. SELBY,
U. S. Commissioner.

Endorsed: No. 1287. United States circuit court, eastern district of Missouri. William Hill, relator, *vs.* Scotland County, respondent. Information for mandamus. ——, attorney for relator. Filed 1st day of March, A. D. 1881. M. M. Price, clerk.

5 And on said first day of March, A. D. 1881, the following proceedings were had on such information, and appear of record, to wit:

Alternative Writ of Mandamus Ordered.

UNITED STATES, *ex rel.* WILLIAM HILL, Relator,
vs.
THE COUNTY COURT OF SCOTLAND COUNTY AND THE JUDGES THEREOF, Respondents. } 1287.

This day comes the relator, by A. J. Baker, Esquire, his attorney, and files information for a writ of mandamus against the said respondents, commanding them to pay or cause to be paid the judgment heretofore rendered in favor of said relator, and against said county of Scotland, for the sum of $45,491, with interest thereon, and costs.

Upon consideration whereof, and being fully advised in the premises, it is ordered that an alternative writ of mandamus issue herein, returnable to the next term of this court, and directed to said respondents, the County Court of Scotland County, and Benjamin F. Bourne, Riley Gale, and Ephraim E. Sparks, the judges thereof, commanding them to forthwith levy and cause to be collected, upon all the real estate and personal property in said county sub-
5½ ject to taxation, a tax for the payment of said judgment, with interest and costs, and to pay the same according to law, or show cause, on or before the first day of the next term of this court, why they refuse so to do.

And thereupon there was issued an alternative writ of mandamus, which, with the marshal's return thereon, is in words and figures following, to wit:

6 UNITED STATES OF AMERICA, } *Set.:*
Eastern District of Missouri, }

The President of the United States of America, to the County Court of Scotland County, Missouri, and Benjamin F. Bourne, Riley Gale & Ephraim F. Sparks, the judges thereof, Greeting:

Whereas it has been represented to our circuit court of the United States in and for the eastern district of Missouri, that William Hill is a citizen of the State of Illinois, and that the county of Scotland is a municipal corporation, created by, and a citizen of the State of Missouri, whose financial affairs are managed by a county court composed of judges, who are citizens of said State; that on the 23d day of April, A. D. 1880, said relator recovered in the circuit court of the United States in and for the eastern district of Missouri a judgment against the said county of Scotland for the sum of $45,491 dollars, with interest at 6 per cent. per annum, and costs taxed at $496\frac{52}{100}$ dollars; that said judgment was recovered upon coupons detached from bonds issued by the said county of Scotland in payment for stock subscribed to the Missouri, Iowa, and Nebraska Railway Company; that a demand has been made on said county court and the judges thereof to pay the said judgment, interest, and costs, or that they levy and cause to be collected upon all the real estate and personal property in said county subject to taxation, a tax according to law for the purpose of paying the said judgment, interest, and costs, and to pay the same, and that said demand has been

refused: that said county has no property out of which said judgment, interest, and costs can be levied, and that the said relator has no other adequate remedy at law.

Now, therefore, you, the County Court of Scotland County, and Benjamin F. Bourne, Riley Gale, and Ephraim E. Sparks, the judges thereof, are hereby commanded to forthwith levy and cause to be collected, upon all the real estate and personal property in said county subject to taxation, a tax for the payment of said judgment, with interest and costs, including the costs of this proceeding, and to pay the same according to law, or show cause on or before the first day of the next term of this court (the 21st day of March, 1881) why you refuse so to do.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 1st day of March, A. D. eighteen hundred and eighty-one.

Issued at office, in the city of St. Louis, in said district, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] M. M. PRICE,
Clerk of said Court.
By A. P. SELBY,
Deputy Clerk.

6½ Upon which alternative writ of mandamus the marshal made a return in words and figures following, to wit:

UNITED STATES OF AMERICA, *Eastern District of Missouri:*

I return on this writ that I have served the same by delivering one original alternative writ of mandamus to Riley Gale, one of the judges of the County Court of Scotland County, on March 5th, 1881, and further, by delivering two original writs of alternative mandamus to W. W. Purmort, he being the clerk of the County Court of Scotland County, in his office on March 5th, 1881. All done at Memphis, in Scotland county, in the above district.

FELIX COSTE, *U. S. Marshal.*
By C. E. SOEST, *Deputy.*

Endorsed: No. 1287. United States circuit court, eastern district of Missouri. United States, *ex rel.* William Hill, relator, *vs.* The County Court of Scotland County and the judges thereof, respondents. Alternative mandamus. Returnable to March term, 1881. Costs: Attorney, 8—; marshal, 8—; clerk, 8—. Returned and filed March 8, A. D. 1881. M. M. Pierce, clerk.

7 And afterwards, to wit, on the 24th day of March, A. D. 1881, the following further proceedings were had, and appear of record, to wit:

Record as to Motion to Quash Marshal's Return to Alternative Writ.

UNITED STATES, *ex rel.* WILLIAM HILL, Relator, *vs.* COUNTY COURT OF SCOTLAND COUNTY AND THE JUDGES THEREOF, Respondents.	1287.

Now come the respondents, by H. A. Cunningham, Esquire, their attorney, and appearing solely for this purpose, file motion to quash marshal's return on the alternative writ of mandamus herein.

Which said motion is in words and figures following, to wit:

Motion to Quash Marshal's Return to Alternative Mandamus.

In the Circuit Court of the United States for the Eastern District of Missouri. March Term, 1881.

THE UNITED STATES OF AMERICA, *ex rel.* WILLIAM HILL, Relator, *vs.* THE COUNTY COURT OF SCOTLAND COUNTY, AND BENJAMIN F. BOURNE, RILEY GALE, AND EPHRAIM E. SPARKS, the Judges Thereof, Respondents.	No. 1287.

Appearing solely for the purposes of this motion, respondents move the court to quash the return of service made by the United States marshal for the eastern district of Missouri upon the
8 alternative writ of mandamus herein issued, because said return of said U. S. marshal is not sufficient in law to bring the persons of these respondents within the jurisdiction of this court.

HENRY A. CUNNINGHAM,
Att'y for Respondents.

9 And afterwards, to wit, on the 15th day of April, A. D. 1881, the following further proceedings were had and appear of record, to wit:

Order Overruling Motion to Quash Marshal's Return to Alternative Mandamus.

UNITED STATES, *ex rel.* WILLIAM HILL, Relator, *vs.* COUNTY COURT OF SCOTLAND COUNTY AND THE JUDGES THEREOF, Respondents.	1287.

Now come the parties, by their attorneys, and the court having considered the respondents' motion to quash the return of service on the alternative writ of mandamus herein, orders that said motion be overruled, and it is further ordered that the respondents have leave to plead to the alternative writ of mandamus on or before April 25th.

10 And afterwards, to wit, on the 25th day of April, A. D. 1881, the following further proceedings were had and appear of record, to wit:

Record as to Motion to Quash Alternative Writ of Mandamus.

UNITED STATES, *ex rel.* WILLIAM HILL, Relator,
vs.
COUNTY COURT OF SCOTLAND COUNTY AND THE JUDGES THEREOF, Respondents. } 1287.

Now come the respondents, by attorney, and appearing solely for this purpose, file motion to quash the alternative writ of mandamus herein.

Which said motion is in words and figures following, to wit:

Motion to Quash Alternative Writ of Mandamus.

THE U. S., *ex rel.* WILLIAM HILL, Relator,
vs.
THE COUNTY COURT OF SCOTLAND COUNTY and BENJAMIN F. BOURNE, EPHRAIM E. SPARKS, and RILEY GALE, the Judges thereof, Respondents. } No. 1287. Consolidated.

Appearing solely for the purpose of this motion, respondents move the court to quash the alternative — herein issued, and to these respondents directed for the reasons—

That it is manifest, upon the record of this court in this proceeding, and in the case of William Hill *vs.* Scotland County, to which this proceeding purports to be ancillary, that these respond-
11 ents are not required by law to make return of such writ, or any return to said writ, but that the same is unauthorized by law.

HENRY A. CUNNINGHAM,
Attorney for Respondents.

12 And afterwards, to wit, on the 23d day of May, A. D. 1881, the following further proceedings were had, and appear of record, to wit:

Order Overruling Motion to Quash Alternative Writ of Mandamus.

UNITED STATES, *ex rel.* WILLIAM HILL, Relator,
vs.
THE COUNTY COURT OF SCOTLAND COUNTY AND THE JUDGES THEREOF, Respondents. } 1287.

Now come the parties herein, by their respective attorneys, and the motion of respondents to quash the alternative writ of mandamus herein, coming on to be heard, the same was argued and submitted.

And the court having fully considered said motion, and being now fully advised in the premises, it is ordered that said motion be, and the same is, overruled.

And thereupon, on motion, leave is granted said respondents to file return to said writ on or before the first day of the next term of this court.

13 And afterwards, to wit, on the 19th day of September, A. D. 1881, the following further proceedings were had, and appear of record, to wit:

Record showing Filing Return to Alternative Writ of Mandamus.

UNITED STATES, *ex rel.* WILLIAM HILL, Relator,
vs.
COUNTY COURT OF SCOTLAND COUNTY AND THE JUDGES THEREOF, Respondents.

Now come the respondents, by attorney, and file return to the alternative writ of mandamus, and also file exhibit in support of said return.

Which said return is in words and figures following, to wit:

Return to Alternative Writ of Mandamus.

In the Circuit Court of the United States for the Eastern District of Missouri. Sept. Term, 1881.

THE UNITED STATES OF AMERICA, *ex rel.*,
vs.
WILLIAM HILL, Relator,
vs.
THE COUNTY COURT OF SCOTLAND COUNTY AND THE Judges thereof, Benjamin F. Bourne, Ephraim E. Sparks, and Riley Gale, Respondents. } No. 1287.

To the honorable circuit court of the United States for the eastern district of Missouri:

Now come the County Court of Scotland County, in the State of Missouri, and the judges of said court, Benjamin F. Bourne, Ephraim E. Sparks, and Riley Gale, and make this their return to the writ, entitled alternative writ of mandamus, herein issued,
14 and to them directed.

Respondents aver that, under the constitution and laws of the State of Missouri, the County Court of Scotland County is a court of record, composed of three members, a majority of whom constitute a quorum for lawful sessions of said court at times and in a manner prescribed by the general statute of said State.

Respondents aver that they were not parties to the proceeding described by relator in said writ, wherein it is alleged that a judgment was rendered against Scotland county for the sum of $45,491, and costs estimated at 496\frac{57}{100}$ dollars; that under the organic and statute laws of the State of Missouri, as authoritatively interpreted by the supreme court of the State of Missouri, before the date of relator's judgment, and before the dates of the contracts in said judgment merged, said county court was and is a part of the State government, with specific powers, duties, and functions derived from the State and not from the county; that it is not the general or unlimited agent or representative of the county; that it can only bind

the county (which is itself a *quasi* corporation, invested with limited corporate powers) by virtue of authority derived from the State government, and in obedience to State laws.

Respondents show that it is true, and was by relator confessed upon the record of said cause of William Hill against Scotland County, wherein the judgment described in said alternative writ was obtained, and to which the said writ purports to be ancillary, that the said judgment was obtained upon interest coupons
15 detached from bonds, or bonds purporting to have been issued by the presiding justice of the County Court of Scotland County, and the clerk of said county court, attested by the seal of said court, and dated Sept. 1st, 1870, in payment of a subscription made by said court, August 9th, 1870, to a corporation designated as the Missouri, Iowa and Nebraska Railway Company, a corporation formed on the 26th of March, 1870, by the consolidation of the Iowa Southern Railway, a corporation organized under the laws of Iowa with the Alexandria and Nebraska City Railway Company, formerly the Alexandria and Bloomfield Railroad Company, organized May 19th, 1866, under the provisions of an act of the General Assembly of the State of Missouri, entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company," approved Feb'y 9th, 1857.

That it was by relator admitted upon the record in said cause, and is true, that said bonds, from which were detached coupons in said judgment merged, were issued by the County Court of Scotland County, on or after the 1st of Sept., 1870, in payment of a subscription pretended to have been made by the county court of said county to the capital stock of said Missouri, Iowa and Nebraska Railway Company.

Respondents state that it is true, and it was admitted by the relator upon the record in said cause of William Hill against
16 Scotland County, described in relator's writ, that the corporators named in the act of the General Assembly of the State of Missouri, entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company," approved February 9th, 1857, did not accept the terms of said act, or thereunder organize, prior to the first day of May, 1866; that it is true, and was so admitted upon the record by the relator in the aforesaid cause, that no subscription to the capital stock of said Alexandria and Bloomfield Railroad Company was made by the County Court of Scotland County, and that the sole pretext for the issue of said bonds was said pretended subscription to the Missouri, Iowa and Nebraska Railway Company.

Respondents aver that it is true, and that it was admitted upon the record of said cause by relator, that at no time, either on or subsequent to the 9th day of February, 1857, did the County Court of Scotland County cause any election to be held in said county to ascertain the sense of the taxpayers of said county as to any subscription to the capital stock of the Alexandria and Bloomfield Railroad Company, or the Missouri, Iowa and Nebraska Railway Company, or any other company, or to ascertain the sense of said taxpayers as to whether any such subscription should be paid by the

17 issue of county bonds or by taxation, or for or against paying any such subscription by direct taxation; that at no time at any election ever held in Scotland county had a majority of or any of the resident voters of said county voted in favor of any subscription by said county, or by the county court of said county, to the capital stock of the said Alexandria and Bloomfield Railroad Company, or said Missouri, Iowa and Nebraska Railway Company, or any other company; that at no general or special election ever held therein had two-thirds of the qualified voters of Scotland County ever assented to any subscription of capital stock by, or any loan of the credit of, the said Scotland county to said Alexandria and Bloomfield Railroad Company, or said Missouri, Iowa and Nebraska Railway Company, or to any other company, or to any acts of the county Court of Scotland County, in any wise recognizing said pretended corporation, or in ratifying any pretended subscription of stock, issue of bonds, or other pretended orders or acts of any court of Scotland county.

Respondents aver that the General Assembly of the State of Missouri, on the 23d of November, A. D. 1857, by section 2 of an act entitled "An act to expedite the sale of county bonds and the collection of railroad subscriptions," which act has never been revised or repealed, and which is therefore still in force, made it unlawful for *any* county court thereafter to levy direct taxes to pay any 18 subscription to the capital stock of *any railroad* company without first causing a poll to be opened at the election precincts in said county, to take the sense of the taxpayers of the same *for and against* paying said subscription by direct taxation.

Respondents respectfully show, that inasmuch as it is manifest from the record of this court in the case to which this proceeding purports to be ancillary, that said judgment was by this court rendered upon the sole ground that bonds issued under the provisions of the aforesaid act of the General Assembly of the State of Missouri, entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company," approved February 9th, 1857, were not governed by the provisions of the general railroad laws of the State of Missouri, authorizing the issue of bonds to railroad companies by counties, etc., it is not lawful in this proceeding to enforce in relator's favor the provisions of said general railroad laws, avowedly enacted, concerning the levy or collection of taxes for the purpose of paying bonds issued in conformity to the terms of said general railroad laws.

Respondents aver that neither on the 9th of February, 1857, nor at the date of the alleged subscription of stock recited in the 19 bonds upon which relator's judgment is based, nor at the date of the alleged issue of said bonds, on the 1st day of Sept., 1870, nor at the present time, was there, nor is there now, any law in force in the State of Missouri requiring or authorizing the County Court of Scotland County, or the judges thereof, to levy any special tax upon the taxable property in Scotland county, in the State of Missouri, for the purpose of paying the judgment in said relator's writ described.

Respondents aver that they did, at the May term, 1881, of the county court of Scotland county, in the State of Missouri, make and cause to be entered upon the records of said court (as will fully appear from a duly certified copy of said order, herewith filed, marked "Exhibit A," and made part of this return) an order levying upon all the property, real or personal, subject to taxation for State purposes in said Scotland county, a tax for county purposes of one-half of one per cent. upon each and every one hundred dollars of the assessed value of such property, and also an additional tax of $\frac{1}{2}$ of one per cent. to form a sinking fund, as ordered by the circuit court of said county.

Respondents aver that during each year prior to the year A. D. 1881, they, or their predecessors in office, have made similar
20 levies. That the aggregate value of all property, real or personal, subject to taxation for State purposes in said Scotland county for the year, A. D. 1881, was two million one hundred thousand dollars.

Respondents show that the property, subject to taxation for State purposes in Scotland county, is owned in severalty by several thousand citizens of the State of Missouri and of other States, none of whom was a party to or is bound by the proceedings wherein the judgment of relator was obtained, or by the contracts in said judgment merged. That under the laws of the State of Missouri in force now, and under the laws of the State of Missouri in force at the date of the judgment in said cause number 1287, of William Hill against Scotland County, to which the writ herein purports to be ancillary, and at the dates of the contracts shown by the record in said cause number 1287, to have been merged in said judgment, said judgment can only be satisfied by these respondents with a warrant drawn by the County Court of Scotland County, in the State of Missouri, upon the county treasurer of said county, payable out of funds in the hands of said treasurer, arising from taxes levied and assessed for county purposes, and designated as the contingent fund. Such a warrant relator has never demanded of these respondents,
21 but these respondents herewith tender to relator such a warrant in payment of his aforesaid judgment, interest, and costs, and are ready and willing to draw other warrants upon said fund when so required for such sum as may be found due to relator, if said warrant herewith tendered is insufficient.

Respondents admit that there are not at the present time sufficient funds in the hands of said treasurer to pay the entire amount of said judgment of relator, but verily believes that in due course of time the collections made by the county collector of said county, and by him paid into said county treasury, and duly placed to the credit of said contingent fund, will suffice to pay said judgment.

Respondents show that there is now in said fund the sum of four hundred and sixty-two $\frac{70}{100}$ dollars, which relator may collect and credit upon his aforesaid warrant or order.

Respondents show that it is, and long has been, the law in the State of Missouri that all holders of county warrants upon the county

treasurer should be paid same, with interest from date of presentation, in the order in which same might be presented.

Respondents aver that under the laws of the State of Missouri, of which they are sworn officers, they will commit grave crimes against the peace and dignity of the State of Missouri, subjecting each
22 individual respondent to indictment, fine, and imprisonment, if, as a county court, they cause to be levied, for the purpose of paying relator's judgment, any other tax than that for county purposes, which they have levied, and out of the surplus of which fund, over and above the necessary expenses of the county government, the Legislature and judiciary of the State of Missouri have, prior to the date of relator's judgment or of the contracts, shown by the record to have been therein merged, clearly indicated that such judgments as relator holds must be satisfied.

2. For further return to said writ respondents aver that it is manifest from the record of the cause to which this proceeding purports to be ancillary that the judgment therein rendered is void, and that the said alternative writ of mandamus has been improvidently issued.

3. For further return to said alternative writ of mandamus, respondents state that it is true, and is made manifest by the record in said cause to which said writ purports to be ancillary, that before this court obtained jurisdiction of said cause, the County Court of Scotland County, in the State of Missouri, and their successors in office, the county treasurer and county collector of said county, and their successors in office, had been perpetually enjoined by
23 the circuit court of Shelby county, in said State, a court of competent jurisdiction from doing anything whatever towards levying or collecting taxes to pay the coupons in said judgment merged. Wherefore, having fully made their return, repondents pray to be dismissed, with their costs in this behalf incurred.

THE COUNTY COURT OF SCOTLAND COUNTY, IN THE STATE OF MISSOURI, AND THE JUDGES THEREOF.
By HENRY CUNNINGHAM, *Their Counsel.*

No. 1287.—EXHIBIT A.

STATE OF MISSOURI, *County of Scotland:*

In the County Court of Scotland County, at the May [term], 1881, held on the 18 day of May, 1881, amongst others were the following proceedings:

"For the purpose of raising funds sufficient to meet the current expense of the county for the ensuing year, it is ordered that there be levied upon all the taxable property of said county as shown by the assessed valuation thereof for the year 1881, including merchants' statements, the sum of five mills upon each dollar of said valuation.

24 And it is further ordered, in conformity with sec. 6881, chap. 145, article 5, of the general statutes of said State, that the treasurer of the county subdivided the above amount as follows: For the payment of the necessary expenses incurred in care of paupers

and insane persons eight and one-third cents on each one hundred dollars. For the payment of necessary expenses for the building of bridges and repairs of roads, including the pay of road overseers, twelve and one-half cts. on each one hundred dollars. For the payment of the salary of all county officers, sixteen and two-thirds cents on each one hundred dollars. For the payment of the fees of grand and petfit jurors, judges and clerks of election, and fees of witnesses for the grand jury of the county, six and one-fourth cents on each one hundred dollars. For the payment of the other ordinary current expenses of the county, to be designated as the contingent fund, six and one-fourth cents on each one hundred dollars.

And it is further ordered that in obedience to an order of the circuit court of Scotland county, and in conformity with the provisions of the general statutes, that a levy of fifty cents on each one hundred dollars, to be known as a sinking fund, and for the payment of interest, *capupum* bonds, and am't borrowed from the co. school fund, twelve and one-half cts. on each one hundred dollars.

A true copy from the records of said court.

Witness my hand and seal of said court, this 15th day of September, 1881.

[SEAL.] W. W. PUMORT, *Clk.*

25 And afterwards, to wit, on the 29th day of September, A. D. 1881, the following further proceedings were had, and appear of record, to wit:

Record Showing Filing Demurrer to Return to Alternative Writ of Mandamus.

UNITED STATES, *ex rel.* WILLIAM HILL, Relator,
vs.
COUNTY COURT OF SCOTLAND COUNTY AND THE JUDGES THEREOF, Respondents. } 1287.

Now comes the relator, by attorney, and files demurrer to return to the alternative writ of mandamus herein.

Which said demurrer is in words and figures following, to wit:

Demurrer to Return to Alternative Writ of Mandamus.

In the United States Circuit Court for the Eastern District of Missouri.

THE UNITED STATES, at the Relation of WILLIAM HILL, Relator,
vs.
THE COUNTY COURT OF SCOTLAND COUNTY, and BENJAMIN F. BOURNE, Ephraim E. Sparks, and Riley Gale, Judges of said County Court, Respondents.

Comes now the relator and demurs to the return of the County Court of Scotland County and the Judges thereof to the alternative writ of mandamus in this cause, for the following grounds of objection, to wit:

1st. It is shown by said return that said respondents have not complied with the mandate commanding them to levy the
26 tax designated in said writ.

2nd. Said return does not state any facts which constitute a legal and valid excuse for failure to comply with the commands of said writ.

A. J. BAKER, F. T. HUGHES,
Att'ys for Relators.

27 And afterwards, to wit, on the 30th day of March, A. D. 1882, the following further proceedings were — and appear of record, to wit:

Demurrer to Return to Alternative Writ Argued and Submitted.

UNITED STATES, *ex rel.* WILLIAM HILL, Relator,
vs.
COUNTY COURT OF SCOTLAND COUNTY AND THE JUDGES THEREOF, Respondents. } 1287.

Now come the parties, by their attorneys, and the demurrer to the return to the alternative writ of mandamus herein is argued and submitted.

28 And afterwards, to wit, on the 31st day of March, A. D. 1882, the following further proceedings were had, and appear of record, to wit:

Order for Peremptory Writ of Mandamus.

UNITED STATES, *ex rel.* WILLIAM HILL, Relator,
vs.
COUNTY COURT OF SCOTLAND COUNTY AND THE JUDGES THEREOF, Respondents. } 1153 & 1287.

On this day, this cause coming on to be heard upon the demurrer of the relator to the return of respondents to the writ of alternative mandamus heretofore issued, on the 1st day of March, 1881, the relator appearing by his attorney, A. J. Baker, and the respondents appearing by their attorney, Henry A. Cunningham, and the court, having heard and considered said demurrer, doth order that said demurrer be sustained; and thereupon, on the 31st day of March, 1882, thetsaid relator moves the court to grant a peremptory writ of mandamus, directed to the said respondents, commanding them to levy, at the next regular term of the county court of said county of Scotland, at which said court will, under the laws of the State of Missouri, levy taxes for State and county revenue, a tax sufficient to pay and discharge the judgment heretofore rendered by this court in favor of relator and against said Scotland county, on the 23d day of April, 1880, in the sum of 845,491 dollars, with
29 the costs and interest accrued thereon, upon all the property in said county made taxable by law, as the same appear upon the tax-books for the year 1882, and that the same be extended upon the regular tax-book of said county for said year, and that

they cause the same to be collected at the same time and in the same manner as the ordinary State and county revenues are collected in said county for said year. And that when and as the same is collected, they cause the same to be paid in satisfaction of said judgment, interest, and costs.

Wherefore it is ordered and adjudged by the court that a peremptory writ of mandamus issue, directed to the County Court of Scotland County, Missouri, and Benjamin F. Bourne, Riley Gale, and Ephraim E. Sparks, judges of said county court, commanding and directing them to levy, at the regular term of said county court for the year 1882, at which, by the laws of the State of Missouri, it is their duty to levy the taxes within said county for State and county revenue, a tax upon all the property of said county made taxable by law, as the same is assessed for taxation for said year 1882, sufficient to pay off and discharge the whole amount, principal,
30 interest, and costs, of a judgment rendered by this court on the 23d day of April, 1880, in favor of the relator, William Hill, and against said Scotland County, in its municipal capacity, in the sum of $45,491 dollars; and that, when so levied, they cause said tax to be extended upon the regular tax-book of said county, whereon is extended the ordinary taxes of said county for State and county revenue, and that they cause the said tax so levied to pay said judgment to be inserted in the general tax bills and collected when and as the ordinary taxes for State and county revenue are collected in said county for said year, and when and as the same is collected the said respondents cause the same to be paid out in satisfaction of such judgment, interest, and costs.

And, further, that said respondents make return of obedience to said writ, upon the first day of the September term of this court for the year 1882, to be begun on the 18th day of September, A. D. 1882.

And afterwards, to wit, on the 21st day of April, A. D. 1882, the following further proceedings were had, and appear of record in said cause, to wit:

31 *Writ of Error, Bond Filed, &c.*

UNITED STATES, *ex rel.* WILLIAM HILL, Relator,
vs.
COUNTY COURT OF SCOTLAND COUNTY AND THE JUDGES THEREOF, Respondents. } 1287.

Now come the respondents, by attorney, and present to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said relator to be and appear at a Supreme Court of the United States at the next term thereof, on the second Monday of October next, which said writ of error is allowed and said citation signed by the judge. And the said respondents also present to the court their bond in the penal sum of one thousand dollars, which bond is approved and ordered to be filed; and on motion of said attorney it is ordered that a supersedeas be awarded staying further proceedings upon the mandamus herein.

Which said bond is in words and figures following, to wit:

32 Know all men by these presents, that we, Thomas McAllister, Geo. T. Myers, and James S. Kerau, are held and firmly bound unto William Hill, relator, in the full and just sum of one thousand dollars, to be paid to the said William Hill, his heirs, executors, administrators, or assigns; to which payment well and truly to be made, we binds ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this — day of April, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas, lately, at the March term, A. D. 1882, of the circuit court of the United States for the eastern district of Missouri, in a suit pending in said court between the United States, *ex rel.* William Hill, relator, and the County Court of Scotland County and the Judges thereof, respondents, final orders and judgments were rendered against the said County Court of Scotland County, and the Judges thereof, respondents: and the said County Court of Scotland County and the Judges thereof, respondents, having obtained a writ of error of the said court to reverse the final orders and judgments in the aforesaid suit, and a citation directed to the said William Hill, relator, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next.

Now the condition of the above obligation is such that if the said County Court of Scotland County and the Judges thereof, respondents, shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

THOMAS McALLISTER. [SEAL.]
GEO. T. MYERS. [SEAL.]
JAMES S. KERAU. [SEAL.]

Approved by—

SAMUEL TREAT, *Judge*.

Endorsed: No. 1287. United States circuit court, eastern district of Missouri. U. S., *ex rel.* William Hill, relator, *vs.* County Court of Scotland County and the Judges thereof. Copy. Bond $1,000. ——, principal; ——, sureties. Filed 21st day of April, 1882. M. M. Price, clerk.

33 UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 1287, of The United States, *ex rel.* William Hill, relator, against The County Court of Scotland County and the Judges thereof, respondents, as fully as the same remain on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this eighth day of May, in the year of our Lord eighteen hundred and eighty-two.

[SEAL.]

M. M. PRICE,
Clerk of said Court.
By A. P. SELBY, *Deputy.*

Endorsed: No. 1287. United States circuit court, eastern district of Missouri. U. S., *ex rel.* Wm. Hill, relator, against County Court of Scotland County and the Judges thereof, respondents. Duly certified transcript of record and proceedings in the above-entitled cause.

Endorsed on cover: E. Missouri. C. C. U. S. No. 636. The County Court of Scotland County and the Judges thereof, plaintiff in error, *vs.* The United States, *ex rel.* William Hill. Filed 4th October, 1882.

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Office Supreme Court U. S.
FILED.
OCT 14 1884
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1884.

THE COUNTY OF SCOTLAND,
Plaintiff in Error,
vs.
WILLIAM HILL,
Defendant in Error.

No. 32.

BRIEF FOR PLAINTIFF IN ERROR.

HENRY A. CUNNINGHAM,
Attorney for Plaintiff in Error.

Pierce Bros., Printers, 118 N. Third Street, St. Louis, Mo.

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1884.

THE COUNTY OF SCOTLAND,
Plaintiff in Error,
vs.
WILLIAM HILL,
Defendant in Error.
} *No. 32.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

During the six years which have elapsed since the institution of the last of the two suits herein consolidated, many of the questions then unsettled have been finally adjudicated, and it is unnecessary to refer to them. The voluminous transcript herein, morever, has, without any fault of plaintiff in error, been encumbered with irrelevant matter, which has never properly been made part of the record in this case.

On the 4th of January, 1878, William Hill filed in the Circuit Court of the United States for the Eastern District of Missouri, a suit numbered 1,157, declaring upon a number of coupons, each for the sum of eighty dollars, due at various dates between Dec. 31, 1873 and 1877, purporting to have been detached from bonds issued and delivered by defendant to the Missouri, Iowa & Nebraska Railway

Company, in payment for stock subscribed in said Company.

Afterwards, on the 6th day of August, 1878, plaintiff filed in said court a second suit, numbered 1,287, against defendant upon certain coupons due December 31, 1876. After issue had been joined in each of said cases, they were consolidated and ordered to be tried together.

To the consolidation of cases involving similar issues in good faith, made between the same parties in order to avoid separate trials, it would be unreasonable to object, but in this instance plaintiff filed an amended and consolidated petition, wherein he not only declared upon coupons previously described in cases numbered 1,157 and 1,287, but, without suing out a new writ or filing a separate petition, to which, under the statute, a voluntary appearance might have been made, he declared in said amended and consolidated petition upon the following described coupons, which had not been sued upon in either of the consolidated cases, viz: Three coupons, each for eighty dollars and interest, due December 31, 1872, purporting to have been detached from bonds numbered 52, 53, 54; six coupons due December 31, 1873, each for eighty dollars and interest, purporting to have been detached from bonds numbered 130, 129, 55, 53, 128 and 54, and ninety-seven eighth maturing coupons, each for eighty dollars and interest, fully described at page 147, of printed record. The aggregate of these additional coupons at date of judgment, April 22, 1880, was nine thousand, three hundred and seventy-eight and seventy-four one-hundredths dollars, ($9,378\frac{74}{100}$). Plaintiff's own testimony, moreover, disclosed the fact which will elsewhere be more fully commented upon, that nearly all the coupons described and identified by plaintiff in either of plaintiff's petitions exceeding twenty thousand dollars of the sum for which he ultimately obtained judgment, were owned by other persons than himself; that some of those whose coupons were thus merged in judgment were citizens of the same state as defendant; and that, as to yet

other coupons, exceeding ten thousand dollars in amount, merged in judgment and undisturbed by any remittitur, plaintiff was entirely ignorant as to their owners' names, and did not know that his own name had been used in suing upon them.

Said amended and consolidated petition, page 146 of printed record, was divided into two counts. The first declaring upon a coupon of eighty dollars, alleged to have been detached from bond No. 5, and the second count, upon 556 other coupons. This petition varied radically from that in Thomas vs. Scotland County, 94 U. S., 684–685, in failing to plead the authority contained in the act incorporating the Alexandria & Bloomfield Railroad Company, in failing to plead the acceptance of the law of Missouri, all or any part of which, by its express terms, could only become operative after formal acceptance (Laws of Missouri, 1866, page 222), authorizing a change of name to that of Alexandria & Nebraska City Railroad Company—with a radical change of route—all of which were admitted by demurrer in the case of Thomas vs. Scotland County, wherein a stipulation was filed, admitting, as facts, the consolidation of the Iowa Southern Railway with the Alexandria & Nebraska City Railroad Company, the assumption of the name of the Alexandria & Nebraska Railway, and the orders of the County Court therein mentioned—all essential facts, which should have been pleaded and proved in chief in this case; facts which certainly were in no wise pleaded, admitted, or proven, as to the first count of plaintiff's petition.

The judge below manifestly overlooked the fact that defendant's second amended answer to the first count of plaintiff's amended petition (page 164, of printed record) differed materially from its answer to the second count of said petition. Said answer to the first count consists of specific denials of the several allegations of plaintiff's petition—especially placing upon plaintiff the obligation of showing authority for the alleged execution of coupon purporting to

have been detached from bond No. 5, and proof of the allegation that it was detached from such bond, and proof of the execution, and authority for the execution of such bond from which the coupon sued on purported to have been detached; authority for alleged subscription of stock, etc. Said answer to said first count further averred that plaintiff was not a *bona fide* holder of said coupon, but received same without paying value therefor, etc.

Said answer to the second count of plaintiff's petition, in addition to similar defenses to those contained in its answer to the first count, contained two pleas of new matter, which the court below construed as substantially confessing the execution and authority for execution, not only for all the coupons sued on in *both* of the counts of plaintiff's petition, but also as confessing the execution and authority for execution of each of the bonds described in either the first or second counts of plaintiff's petition. Under the law governing pleading in Missouri, the new matter contained in the defendant's answer to the second count of plaintiff's petition could only be presented by confession and avoidance; and, while plaintiff in error will endeavor, upon the argument of this case, to show that the court erred in its construction, even of said answer as applied to the second count, it would seem to require no argument to show that no admission which an answer to the second count contained could be made applicable to another count of the petition, declaring upon a different instrument, which count had already been separately and differently answered.

It is well to note here the fact that the only bond offered in evidence was a bond numbered 5, from which the coupon sued on, in the first count, was alleged in the pleading, but not proven on the trial, to have been detached.

The new matter, in answer to the second count of plaintiff's petition, set forth that the coupons in said count declared upon were really detached from certain bonds executed during the vacation of the court, by one of the three judges of the county court and the clerk; and that on the

11th of September, 1871, while said pretended bonds were still in the hands of the agent of the county, an injunction proceeding was filed, and subsequently, on the 21st of September, 1871, an injunction was issued from a State court of competent jurisdiction, and was served upon said County Judges and upon the Missouri, Iowa & Nebraska Railroad Company, and others, the object of which was to prevent the delivery or circulation of said bonds and coupons, and to cause their cancellation, because there was no lawful authority for their issue. That after said suit had been unsuccessfully defended by defendants, and after a decree had been rendered by said State court that said bonds were null and void, and should be delivered up and cancelled, the said case was carried, by those enjoined, to the Supreme Court of Missouri, where the decree of the lower court declaring said bonds null and void, and ordering them to be delivered up and cancelled, was affirmed and made perpetual. Said answer set forth that the plaintiff, and each preceding holder of the coupons sued on, received same after the same had been detached from said pretended bonds, without paying value therefor, and with actual notice of all of the facts set forth, and that no election had ever been held to obtain assent of qualified voters, etc., to any subscription of stock or issue of bonds, etc.

To this answer plaintiff filed a reply, setting up some of the facts which should have been pleaded in his petition. Under the practice in Missouri all the averments of the reply are assumed to be denied by the defendant. The reply, in this case, is, probably, of little importance, because it not only pleaded matter which should have been averred in the petition, but because the bill of exceptions shows that no attempt was made by plaintiff to prove any averments of his reply.

The record shows that a jury was waived, and on the 22d of April, 1880, the case was tried before the court, and plaintiff's entire case, as shown by the bill of exceptions, consisted in the offer in evidence of 468 coupons, which,

excepting date of maturity and the number of coupon, or of the bond from which it purported to have been detached, was, in words and figures, as follows:

"$80. MEMPHIS, Mo., Sept. 1, 1870.

"The County of Scotland, State of Missouri, will pay to the bearer, on Dec. 31, 1873, at the Farmers' Loan and Trust Company, in New York, eighty dollars, being one year's interest on bond No. 5, for $1,000.

S. MCDONALD,
County Clerk."

[There is no such officer known to the laws of Missouri as County Clerk.]

It will be remembered that plaintiff's amended petition declared upon 557 coupons, and the record shows he offered 468, so that he did not attempt to support the issues made as to eighty-nine coupons, each for eighty dollars, with interest, upon which he received a judgment of $53,951; that after remitting as to $8,400, and withdrawing for new suit, 97 eighth maturing coupons, only 371 coupons, of $80, could have been left to support a judgment still held at $45,491. To the admission of each of said 468 coupons in evidence, the bill of exceptions (page 188 of printed record) shows that defendant interposed objections that no proof had been offered that defendant executed said instruments, or that either of them had been detached from either the bonds referred to in the two counts of plaintiff's petition; or that there was authority for their execution. The court overruled all such objections, subject to defendant's exceptions.

As already stated, plaintiff offered in evidence only one bond, No. 5. It should be kept in remembrance that the instruments sued on were not bonds, but coupons, and that no proof was made that the coupons were detached either from said bond No. 5, or from any bond purporting to have been made by defendant.

To the admission of said bond No. 5 defendant objected, because no proof of its execution, or the authority of its

execution was offered; whereupon the court, subject to defendant's exception, declared the law to be that the second, third and fourth counts of defendant's second amended answer to plaintiff's amended and consolidated petition admitted the execution of the instrument sued on by the persons named in their official capacity, and that they had authority to bind the county defendant.

As already intimated, the court below entirely overlooked the fact that the only pleading of defendant concerning this very bond, No. 5, or the coupon alleged, but not proven, to have been detached from it, was the first count of its answer, specially traversing every material allegation of plaintiff's petition.

Without having offered other evidence in support of the issues made by him, plaintiff rested his case (page 190 of printed record); whereupon the court, subject to defendant's exception, refused a declaration of law that, upon the case made by plaintiff, he could not recover. Subject to similar objection, the court below excluded testimony offered by defendant, that plaintiff had practiced a fraud upon the jurisdiction of the court; was not the owner of either of the coupons sued on, or the real party in interest prosecuting the action. That by the testimony of plaintiff himself (page 218, printed record, page — of this brief), among the real parties in interest, owning the coupons sued on and actually prosecuting this action, were Thomas B. Hill, a citizen of the same State with defendant; other persons whose names, places of residence or ownership were not indicated by plaintiff, and Henry Hill, and other citizens of Illinois and New York; and that said plaintiff not only did not own, but was not even aware of the use of his name as plaintiff, in suing upon the following coupons, ultimately merged in the judgment, and not pretended to have been released by plaintiff's remittitur, viz: Four third maturing coupons, each for eighty dollars and interest, purporting to have been detached from bonds numbered 116, 117, 87 and 31, due December 31, 1873. Twenty-nine sixth maturing

coupons, purporting to have been detached from bonds numbered 20, 21, 42, 50, 51, 58, 59, 60, 62, 72, 73, 74, 87, 95, 96, 107, 108, 119, 120, 121, 122, 148, 149, 150, 151, 152, 185, 186 and 190.

Nineteen seventh maturing coupons, purporting to have been detached from bonds, numbered: 50, 51, 72, 73, 74, 87, 95, 96, 107, 108, 114, 148, 149, 150, 151, 152, 162, 185, 186.

The coupons, which said deposition showed were owned by Thomas B. Hill, of Missouri, a citizen of the same State with defendant, were sixth and seventh maturing coupons, purporting to have been detached from bonds numbered 32, 33, 34, 153, 154, 155, 156 and 157—amounting to $1,280, with interest. Plaintiff evidently did not know that the eighth maturing coupons from said bonds, as well as other bonds, had also been included in the suit, but as said eighth maturing coupons were withdrawn as far as it was possible so to do by plaintiff's remittitur, only $1,280, with interest, of Thomas B. Hill's coupons, may now be said to remain merged in plaintiff's judgment.

Said deposition of plaintiff intimates that after the institution, by the latter, of the two suits—consolidated suits—he and one Knox bought nine loose or "extra" coupons of eighty dollars, from bonds numbered 52, 54, 55, 53, 128, 129, 130—which were not sued on in either of said suits, but merged in and now remaining in plaintiff's judgment.

The aggregate amount, still merged in judgment, of coupons owned by citizens of same State as defendant—coupons not identified and not known to have been sued on at all, "extra" coupons bought after the institution of two suits consolidated, and eighth maturing coupons which matured after date of institution of latter of two consolidated—was over seventeen thousand dollars.

If it was possible to rectify such wrongs by remittitur withdrawing coupons with leave to sue again, it will be seen that plaintiff only attempted so to do, to the extent of eighth maturing coupons, amounting to something over eight thousand dollars.

Although plaintiff neither pleaded nor proved the requisite authority of county officers to bind the county either by transfer of special charter power or by condition precedent of election, as he should have done in support of the first count of his petition, defendant offered, by way of abundant precaution, to prove that no such election of qualified voters had ever been held, but the court excluded the testimony. Defendant, in like manner, was precluded from proving that on the 11th of September, 1871, an application for injunction was filed, or that on the 21st of September, 1871, an injunction was granted by a State court of competent jurisdiction, against the Missouri, Iowa & Nebraska Railway Company, and other necessary parties, and that in said proceeding the said State court, and afterwards the Supreme Court of the State, had declared the bonds, from which were detached the coupons declared upon in the second count of plaintiff's petition, null and void, because the route had been changed, the consideration had failed, and because, under the facts confessed, there was no power to make subscription or issue bonds, and that plaintiff and every preceding holder of said coupons received same without having paid value therefor, and with full actual notice of all aforesaid facts. (Printed Record, pages 171, 196, 222 and 223).

Defendant, having requested the court to make certain special findings of the facts, the court, subject to defendant's exception, declared the law to be that under the pleadings there could be no special findings.

Plaintiff is shown by the record to have declined to offer any evidence in rebuttal, and the bill of exceptions shows that all evidence offered by either party is therein contained, and that the court gave judgment for the sum of $53,951—$182 more than was asked for by plaintiff's amended petition.

Defendant's motion for a new trial having been overruled, the court also overruled, subject to defendant's exception, defendant's motion in arrest of judgment (page 225, printed record), which, among other grounds, set up the insufficiency

of plaintiff's petition, the excessive judgment, and the fact that in the judgment had been merged coupons, concerning which the court had not obtained jurisdiction.

Upon the hearing of the motion in arrest of judgment, plaintiff (page 226, printed record), elected "to remit the amount of the judgment which is based upon eighth maturing coupons, falling due after August 6, 1878 (the date of the filing of the latter of the two consolidated suits), and, thereupon, filing his remittitur in the sum of $8,460.24, and leaving the judgment to stand for the sum of $45,491. The court, subject to defendant's exceptions, overruled said motion in arrest of judgment, and gave plaintiff leave to withdraw as uncancelled, and again sue upon, said eighth maturing coupons, due after August 6, 1878. Said order, in naming said coupons, with leave for new suit, omitted eighth maturing coupons from bonds numbered 4, 133 and 5, declared upon by plaintiff (page 147, 226, printed record), but it is due to plaintiff to admit that the amount of remittitur was sufficient to cover said unnamed coupons; but inasmuch as the original judgment was for $53,951.24, being $182 in excess of the amount of principal and interest to which, even under all the demands of plaintiff's petition, he was entitled April 22, 1880, it is evident that, assuming the correctness of every action and demand of plaintiff, the judgment still remained $182 in excess of the amount to which, under any circumstances, he was entitled, whilst, regarded from the standpoint of plaintiff in error, it not only remains from nine to twenty-four thousand dollars in excess, but is tainted with fraud upon the jurisdiction of the court, and, for that and many other reasons, should be reversed.

The fact that the court below excluded evidence offered by defendant, showing that the plaintiff and those who really owned the coupons sued on, and each preceding holder of said coupons, received same without paying value therefor, and with full actual notice of the several defenses set up in the third and fourth counts of defendant's second amended answer, makes his case entirely different from any

which has been previously brought to this court from Missouri, and justifies defendant in submitting an elaborate statement of said defenses, and an appendix showing text of relevant laws involved therein.

The Special Charter Power.

On the 3d day of March, 1851 (L. M., 1851, p. 23), the General Assembly of the State of Missouri, by an act entitled "An Act to incorporate the North Missouri Railroad Company," declared by Sec. 14 of said act:

"It shall be lawful for the county court of any county, in which any part of the route of said railroad may be, to subscribe to the stock of said company, and it may invest its funds in the stock of said company, and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper measures to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it and receive its dividends; and (*sic*) incorporated city, town or incorporated company may subscribe to the stock of said railroad company, and appoint an agent to represent its interests, give its vote and receive its demands (*sic*), and may take proper steps to guard and protect the interests in (*sic*) such city, town or corporation."

On the 9th day of February, 1857 (L. M., 1856–7, p. 95, 96), the General Assembly of the State of Missouri, by an act incorporating the A. & B. R. R. Co., and taking effect on said day, provided by Section 10 thereof:

"Said company shall in all things be subject to the *same restrictions*, and entitled to all the privileges, rights and immunities which were granted to the North Missouri Railroad Company, by an act entitled 'An Act to incorporate the North Missouri Railroad Company, approved March 3, 1851,' so far as the same are applicable to the company hereby created, as fully and completely as if the same were hereby re-enacted."

Section 12 of said act provided:

"The stockholders of said company shall be and are hereby exempted from the effect of sections nine and ten of the act to authorize the formation of railroad associations to regulate the same, approved December 13, 1855." Said sections 9 and 10 merely referred to double liability of stockholders, and to increase of capital stock.

The existence of this section has never before been suggested in any case.

Among the restrictions which defendant will show that the North Missouri Railroad Company was subjected, under the act of 1851, was a limitation to the general tax fund as to county's power to pay bonds issued, and a limitation of six per cent per annum as to the interest to which its bonds might be at. If the aforesaid Section 12 of the charter of the A. B. Railroad Company made all of the general railroad law, excepting Sections 9 and 10, part of the charter, it will be shown that there was still no power to issue bonds bearing more than seven per cent annual interest, instead of the eight per cent bonds described in this case.

This charter, unlike nearly every other Missouri railroad charter heretofore construed by this court, was subject to amendment.

If, on the other hand, the general railroad law of 1855, and its amendments, became part of the A. & B. charter of 1857, (and if the law of Missouri, as settled by its highest court at the date of the contracts herein and at the present time, is respected, it must be so held), the following sections of the general railroad law became part of the charter (Rev. Stat. Mo., vol. 1, p. 427):

"SEC. 30. It shall be lawful for the county court of any county, and the city council of any city, to subscribe to the capital stock of any railroad company, *duly organized under this or any other act in this State;* and the county court or city council subscribing, or proposing to subscribe, to such capital stock, may, for information, cause an election to be held to ascertain the sense of the tax payers of such

county or such city as to such subscription, and as to whether the same shall be paid by issue of county or city bonds, as the case may be, or by taxation."

The word "may" in above section always meant "shall" (42 M. R., page 171, 1869).

This section was amended, January 14, 1860, by substituting the word "shall" for "may." (Laws of Missouri, 1859–60, page 88.)

The general law was further amended by the supplemental act, dated March 23, 1861 (Laws of Mo., 1860–1861, page 60), by declaring it to be unlawful for the county court of any county to exercise the powers conferred by said section 30, unless the same shall have been voted for by a majority of the resident voters of said county *qualified to vote for State and county officers.*

This act was not repealed by the subsequent revision, because it was a separate act. (G. S. Mo. 1865, p. 897, sec. 5 and 6), and was not repugnant to this 3d section of article 2 of the constitution of Missouri, 1865, because it restricted the election to qualified voters. The text of said act is here set forth:

"An act *supplemental* to an act to authorize the formation of railroad associations, and to regulate the same, approved December 13, 1855."

"SEC. 1. Whenever the County Court of any county, or the city council of any city, shall be satisfied that the citizens of said county or city desire to subscribe to the stock of any railroad company, it shall be the duty of such court or the city council to order an election to be held in such county or city, in accordance with the 30th section of the above recited act—giving at least thirty days' notice of the time and place, etc., and of a majority of all the resident voters of said county or city, who are qualified to vote for county and State officers, and who shall vote at such election —shall cast their votes for subscribing said stock; then the County Court or city council shall subscribe such stock to said road.

"SEC. 2. It shall not be lawful for the County Court of any county to subscribe to the capital stock of any railroad company, unless the same has been voted for by a majority of the resident voters, who shall vote at such election, under the provisions of this act."

By the revision of 1865, there was substituted for section 30, of the general railroad law of 1855, the following:

Sec. 17, of Chapter 63, general statutes of Mo., 1865, p. 348. "It shall be lawful for the county court of any county to take stock for such county, etc., in, *or to loan the credit* thereof to any railroad company, *duly organized* under this or any other law, provided that two-thirds of the qualified voters of such county, etc., at a regular or special election to be held therein, shall assent to such subscription."

SEC. 31. R. S. of Mo. 1855, page 427, continued in force, as sec. 18, G. S. of Mo. 1865, page 338. Upon the making of such subscription by any county court or city, *as provided for in the previous section, such county or city shall thereupon become, like other subscribers to such stock, entitled to the privileges granted, and subject to the liabilities imposed by this act, or by the charter of the company in which such subscriptions shall be made. And, in order to raise funds to pay the installments which may be called for, from time to time, by the board of directors of such railroad, it shall be the duty of the county court or city council making such subscription, to issue their bonds, or levy a special tax*, upon all property and taxables, made taxable by law for State and county purposes, *and upon the actual capital that all merchants and grocers may have invested in business*, in the county or city, to pay such installments, etc.

SEC. 32, (sec. 19, G. S. 1865). For all such taxes levied and collected for railroad purposes, the county court or the city council, as the case may be, shall cause to be issued and delivered to the *persons paying such special tax*, a certificate for the amounts thereof paid; and such cer-

tificate shall state the county or city in which, and the railroad for which, the tax was collected, and shall be transferable by the holders thereof, and convertible into stock, etc. The assessment, collection and payment of the taxes authorized by this section, shall be provided for and enforced as any other taxes for county or highway purposes.

SEC. 33. (R. S. Mo. 1855, p. 427.) (G. S. Mo., 1865, sec. 20.) Any county subscribing for railroad stock which shall have internal improvement funds, or overflowed or swamp lands, granted to it by the state, may apply such funds, or mortgage or sell such overflowed or swamp lands, to pay such subscription or any part thereof, and provide for the remainder, if any, *by the tax as aforesaid*; and any county or city subscribing as aforesaid, may (if so required by the railroad company, to raise funds to pay the installments in anticipation of the collection and payment of its railroad tax,) issue the bonds of such city or county, of denominations not exceeding one thousand dollars, and bearing interest at a rate not exceeding *seven* per cent per annum.

SEC. 34. (G. S. Mo., 1865, sec. 21, page 339.) Any county court or city which has *heretofore* subscribed to the capital stock of any railroad in this state, shall be entitled to the privileges, and subject to the liabilities of other stockholders in such company, and the county court or city council *shall have all the rights and powers* to provide funds to pay *such subscription* as are granted to county courts and cities by this act, and may levy a *special tax to pay the interest on their bonds*, or to provide a sinking fund to pay the principal.

SEC. 57. (Re-enacted as sec. 38, G. S., 1865.) All existing railroad corporations within this state, and such as *now* or may be hereafter chartered, shall, respectively, have and possess all the powers and privileges contained in this act; and they shall be subject to all the duties, liabilities and provisions, *not inconsistent with the provisions of their charter*, contained in this act.

On the 9th day of February, 1857, the same day that the charter of the Alexandria and Bloomfield Railroad was chartered, the Legislature added to the general railroad law, the following amendment, constituting contemporaneous interpretation of the effect of the North Missouri charter incorporated in the aforesaid Alexandria & Bloomfield charter by the aforesaid section 10 (Laws of Mo., 1857, p. 161):

An act to amend an act, entitled "An act to authorize the formation of railroad associations, and to regulate the same."

§ 1. That the bonds of the county of St. Louis, issued by the county court of said county, to the North Missouri Railroad and the St. Louis & Iron Mountain Railroad Companies respectively, of seven hundred and fifty thousand dollars to the North Missouri Railroad Company, and of five hundred thousand to the Iron Mountain Railroad Company, upon the application of said railroad companies, made to the county court on the 8th of October, 1856, shall be distributed so as to be due and payable equally through five years, beginning with the year 1860; and said county court is hereby empowered and required to levy a special tax upon the whole of said county, including the city of St. Louis, to pay said bonds as they fall due, which tax shall begin in the year 1860, provided said tax shall be levied in like manner, and subject to all the provisions and exemptions of the act to which this is amendatory.

This amendment manifestly formed a part of the general railroad law and of the Alexandria & Bloomfield charter by sec. 12 of said act, and is valuable as affecting all concerned with notice that under the privileges and restrictions of the North Missouri charter of 1851, which was enacted two years before the first general railroad law of 1853, there was no power to levy special taxes to pay bonds issued in 1856, in pursuance of sec. 14 of said charter. If the holder of Scotland County bonds relies upon the power

granted by the North Missouri charter, it would seem he thus has actual notice that he can only look to the surplus of the general county fund. In 1851 it was usurious to make any bond bearing more than six per cent interest annually. That was one of the restrictions of the charter of the North Missouri charter in 1851. If he claims that sec. 12 of the Alexandria & Bloomfield charter, now, for the first time, brought to the attention of any court, made the general railroad law part of this charter of the Alexandria & Bloomfield Railroad Company, the provisions of that general law present limitations and restrictions inconsistent with the judgment rendered herein.

That general law, whenever thus made part of a charter, as authoritatively interpreted by the Supreme Court of Missouri at *the date of the contracts* herein and at the present time, modified the previous section granting power to subscribe, made an election of qualified voters a condition precedent to issue of bonds, precluded the issue of bonds bearing more than seven per cent annual interest, and provided that the persons who ultimately paid taxes to redeem said bonds, and not the county, should receive and own the stock in payment of which said debt was to be created.

ASSIGNMENT OF ERRORS.

I.

The court below erred in admitting in evidence, against defendant's objection, Coupon No. 5, and each of the other 467 writings obligatory, called coupons, with lithographed signature, "S. McDonald, *County Clerk*," without proof of the execution by said county of either of said instruments, or the existence of such an office as "county clerk—without proof of the authority for such execution, and without proof that each of said instruments was detached from a bond made by defendant.

II.

The court below erred in admitting in evidence the bond numbered 5, without proof of its execution, without proof of the authority for such execution, and without proof that any coupon sued on had been detached from said bond.

III.

The court below erred in sustaining plaintiff's objection to the admission of evidence proffered by defendant (pages 190 and 215 of printed record) that coupons sued on were not owned by plaintiff, that plaintiff was not the real party in interest, prosecuting said action, and did not even know that his name had been used in suing for many of said coupons, and that there was, in fact, a fraud upon the jurisdiction of the court.

IV.

The court below erred in sustaining plaintiff's objections to the admission of the deposition of plaintiff (printed record, pages 215–222). Said deposition, in substance, showed that plaintiff only owned the coupons from eighteen bonds, amounting to $1,500 and interest; that Thos. B. Hill, of the city of St. Louis, State of Missouri, a citizen of the same State, as defendant, owned the 6th, 7th and 8th maturing coupons from bonds Nos. 32, 33, 34, 153, 154, 155, 156, amounting to $1,920 and interest; that plaintiff did not own, hold or even know for whose use his name was employed in suing for the following described coupons, subsequently merged in plaintiff's judgment: 4 coupons from bonds Nos. 116, 117 and 87 and 31, due Dec. 31, 1873, for $320,29, with interest; twenty-nine 6th maturing coupons from bonds numbered 20, 21, 42, 50, 51, 58, 59, 60, 62, 72, 73, 74, 87, 95, 96, 107, 108, 119, 120, 121, 122, 148, 149, 150, 151, 152, 185, due Dec. 31, 1876, for $2,320, with interest; nineteen 7th maturing coupons from bonds numbered 50, 51, 72, 73, 74, 87,

95, 96, 107, 108, 114, 148, 149, 150, 151, 152, 162, 185, and 186, due Dec. 31, 1877, for $1,520, with interest.

The remaining coupons seem, from said deposition, to have been owned by Secor, Gebhard & Stone, of New York; Gaylord & Co., of St. Louis, Mo.; Henry Hill, of Illinois; Mellon & Dodge, whose places of residence are not given.

Upon cross examination by plaintiff's counsel, plaintiff stated that he originally purchased the bonds in open market, without notice of defects in their execution, and that he did not remember of hearing of the injunction suit until after his purchase.

V.

The court below erred in refusing to permit defendant to prove the allegations of the fourth count of its answer, setting up the injunction suit of Wagner vs. Metz, *et al.*, and in excluding the record in said case (pages 191 to 215, printed record), showing that on the 21st of September, 1871, in a suit filed on the 11th of September, 1871, an injunction was granted against the county officers of Scotland County, and the Missouri, Iowa & Nebraska Railway Company; that ultimately, in said suit, the coupons sued on were declared null and void, because the route of said road had been unlawfully changed, and because at no election of qualified voters, etc., had sanction been given to a subscription to the said company proposing to build over said new route, and that said judgment had been affirmed by the Supreme Court of the State of Missouri (69 M. R. 150); and that plaintiff and Henry Hill, and each and every pretended holder of the coupons in this case sued on, received same with actual notice of the pendency of said suit of Wagner vs. Metz, *et al.*, and without having paid value for either of said coupons (printed record, pages 223, 215, 190, 171).

VI.

The court below erred in excluding proofs offered by defendant (page 223 printed record) that Charles Metz, agent, had actual notice of the pendency of the aforesaid suit of Wagner vs. Metz, *et al*, at the time he delivered the instruments described in defendant's pleading, to the Missouri, Iowa & Nebraska Railway Company, and that the Missouri, Iowa & Nebraska Railway Company, and each subsequent holder, received the instruments declared upon, with actual notice of the pendency of the aforesaid suit of Levi J. Wagner, *et al.*, vs. Metz, *et al.*

VII.

The court below erred in excluding the evidence offered by defendant (page 223 printed record), that Henry Hill, as superintendent, and F. M. Drake, as president of the Missouri, Iowa & Nebraska Railway Company, executed and delivered to said Metz a bond, in words and figures as follows:

"We, the undersigned, Missouri, Iowa & Nebraska Railway Company, hereby obligate and agree and bind ourselves, our heirs and assigns, to indemnify Charles Metz, of the county of Scotland, State of Missouri, against all damages, costs, expenses, etc., which the said Metz, as trustee for the county of Scotland, aforesaid, to hold and deliver certain railroad bonds issued and placed in his hands by the county court of said county, may incur by reason of certain injunction suits now pending in the Scotland County Circuit Court, or by reason of any petition for injunction which may be filed before Judge E. V. Wilson, in Clark County, on September 2, 1871.

"In witness whereof, we have hereunto set our hands and seal this 21st day of September, A. D. 1871.

"Missouri, Iowa & Nebraska Railway Co.
"By F. M. Drake, *Pres't*,
"Henry Hill, *Supt. M., I. & N. R. R.*"

VIII.

The court below erred in declaring the law to be that the second, third and fourth counts of defendant's second amended answer admitted the execution of the coupons sued on, by the persons named, in their official capacity, and that they had authority to bind the county. Whatever may have been the effect of admissions of these answers, directed exclusively to the second count of plaintiff's petition, the court manifestly erred in declaring that they confessed the execution of the instrument sued on in the first count of plaintiff's petition, which was separately denied.

IX.

The court below erred in declaring the law to be (p. 224, printed record), that, under the pleadings, there were no facts which it was necessary to have specially found, and in refusing defendant's prayer to make a special finding of the facts in this cause.

X.

The court below erred in overruling defendant's motion in arrest of judgment. The remittitur of $8,460.24, based upon coupons maturing after August 8, 1878, with leave to withdraw and again sue upon same, did not satisfy the objections urged by said motion in arrest. The coupons could only be withdrawn by setting aside the entire judgment. The judgment was still many thousand of dollars in excess of the amount for which, under any circumstances, a judgment should have been rendered. There still remained in the judgment sixteen 6th and 7th maturing coupons, owned by Thos. B. Hill, a citizen of the same State with defendant, concerning which the court could not, even by consent, obtain jurisdiction.

There still remained merged in the judgment, fifty-two coupons, of $80 each, and interest, which plaintiff, in his

testimony, showed that he did not hold or own, and did not even know for whose use they were sued on in his name.

There still remained merged in the judgment the nine "extra" coupons, bought by plaintiff and one Knox, but not involved in either of the consolidated suits, and for which no lawful action had ever been instituted, and for which no judgment could be lawfully rendered. The court could only have obtained jurisdiction of the causes of action upon the said nine "extra" coupons in one of two ways: first, by reason of their having been sued on in one of the two consolidated cases; second, by the filing of a separate suit thereon, and the suing out of a writ, or defendant's voluntary appearance thereto.

Even if plaintiff was entitled to recover upon the 468 coupons, each for $80, and interest, by him offered in evidence, and said coupons were so distributed as to bear the greatest possible amount of principal and interest for which, under the pleadings of plaintiff, he could obtain judgment, this court, noting the fact that plaintiff withdrew after judgment (with leave to sue again), ninety-seven 8th maturing coupons, amounting to $8,460.24, it is perceived that there only remained to sustain the judgment, as left by said remittitur, 371 coupons. The greatest amount for which judgment could have been rendered upon any remaining 371 coupons described in the amended and consolidated petition (page 146, printed record) would have been—

3	second maturing coupons, for $80 each, amounting, with interest at date of judgment, April 22, 1880, to, . . .	$346 85
67	third maturing coupons, for $80 each, amounting, with interest at date of judgment, to	7,280 43
63	Fourth maturing coupons, of $80 each, amounting, with interest at date of judgment, to	6,647 92
61	Fifth maturing coupons, of $80 each, amounting, with interest at date of judgment, to	6,144 83

151	Sixth maturing coupons, of $80 each, amounting, with interest at date of judgment, to	14,481 90
	Deducting the manifest deficit from the last coupons maturing, there would have remained 26 seventh maturing coupons, of $80 each, amounting, with interest at date of judgment, to	2,368 62
	Making a total of 371 coupons and interest, .	$35,260 55

—ten thousand dollars less than the amount for which the judgment was left to stand, after plaintiff 's remittitur.

If one could lawfully obtain judgment merely by declaring upon instruments, without filing same or producing them in evidence—if plaintiff, by producing 468 coupons, obtained the right to judgment upon the 556 coupons described in his amended petition, the judgment should have been for $53,789.24, instead of $53,951.24, from which deducting the remittitur of $8,460.24, there should have remained a judgment for $45,309.24, instead of $45,491.24.

Under the facts set forth, the court should have set aside the entire judgment.

XI.

The court below erred in rendering a general judgment against the defendant. The court rendered said judgment upon the authority of the law incorporating the Alexandria & Bloomfield Railroad Company, the twelfth section of which law, by excluding certain sections of the general railroad law, made the remainder thereof part of its charter. The general railroad law, as it stood in force on the 9th of February, 1857, precluded the rendition of a judgment in favor of plaintiff, upon an eight per cent bond, payable by any special taxation or otherwise than out of the surplus of general funds remaining after payment of costs of county government, and said limitation should have entered into and formed some part of the judgment.

XII.

The twelfth section of the act incorporating the Alexandria & Bloomfield Railroad Company having, by excluding certain sections of the general railroad law, in force on the 9th of February, 1857, made the remainder of said law part of the charter, there was no power in any county to issue bonds bearing more than seven per cent interest, as provided by Section 33 of said law, and the issue of bonds bearing eight per cent annual interest coupons, merged in plaintiff's judgment, was unauthorized by law, and the judgment thereon rendered was in violation of law.

XIII.

The court below erred in refusing, at the end of plaintiff's case, to declare the law to be that, upon the case, as made, he could not receive judgment.

XIV.

The court below erred in excluding defendant's evidence that no election was ever ordered to be held in the county of Scotland, in the State of Missouri, for the purpose of obtaining the assent either of a majority of the tax payers, a majority of the resident voters of said county, or of two-thirds of the qualified voters of said county, to any subscription of stock to the Missouri, Iowa & Nebraska Railway Company, or to any other company, or to any issue of bonds.

POINTS AND AUTHORITIES.

I.

Plaintiff's testimony disclosed the fact that the suit was a fraud upon the jurisdiction of the court, and instead of rendering judgment upon coupons confessedly owned by a citizen of the same State with defendant, the court below should have dismissed the case.

Plaintiff's deposition (page 215 of printed record, 18 of this brief), was excluded upon plaintiff's objections (page 222, printed record) that "the bonds were delivered to the railroad company before any injunction was issued, and that the bond is a legal act of the county, and binding in anybody's hands;" plaintiff ignored several of the purposes for which said deposition was offered, especially that it proved "some of the bonds sued on were owned by other persons in said deposition named," to wit: Thomas B. Hill, of the city of St. Louis, State of Missouri, and Charles H. Mellon, James B. Dodge, Gaylord & Co., Henry Hill, and others. The deposition (at page 217, printed record) shows that Thomas B. Hill was a citizen of the State of Missouri, and at page 218 shows that he owned coupons detached from eight bonds, viz: Nos 32, 33, 34, 153, 154, 155, 156 and 157. The amended and consolidated petition (pages 146 and 147, printed record) shows that eight each of the sixth, seventh and eighth maturing coupons, detached from said bonds, *i. e.*, 24 coupons of $80 each, total amount, $1,920, which, with interest, amounted to $2,186, were merged in plaintiff's judgment; the remittitur as to eighth maturing coupons, if properly made, left $1,495.65 of these coupons still in judgment against defendant. Plaintiff (page 217, printed record) claims to have bought 45 to 60 bonds of $1,000 each.

His detailed statement shows that plaintiff undertook to identify, as owned by himself and various other persons, in his deposition named, one hundred and six bonds of $1,000 each, described in his amended and consolidated petition, filed three months prior to the date of said deposition (printed record, page 217), besides nine "extra" second and third coupons from bonds Nos. 52, 53, 54, 55, 128, 129, and 130, owned by plaintiff and George S. Knox, which were doubtless bought after the institution of the suits, consolidated, as they were not described in either of said petitions, and ought not to have been merged in plaintiff's judgment.

Plaintiff, in his deposition, did not pretend to identify, as owned by anybody, or as sued for in his name to the use of anybody, or as detached from bonds in his possession, either of the following described coupons declared upon in said amended petition (page 146, printed record), and ultimately merged in this remarkable judgment: four third-maturing coupons, each for eighty dollars, from bonds Nos. 116, 117, 87, 31; twenty-nine sixth maturing coupons, each for $80, detached from bonds Nos. 20, 21, 42, 50, 51, 58, 59, 60, 62, 72, 73, 74, 87, 95, 96, 107, 108, 119, 120, 121, 122, 148, 149, 150, 151, 152, 185, 186 and 190; and nineteen seventh maturing coupons, detached from bonds numbered 50, 51, 72, 73, 74, 87, 95, 96, 107, 108, 114, 148, 149, 150, 151, 152, 162, 185, 186.

The transcript contains what purports to be an agreement, in No. 1,287, of Waldo P. Johnson, one of defendant's counsel, to the effect that no advantage should be taken of the fact that other persons than plaintiff owned some of the coupons. It is sufficient to say that even if such agreement had been offered on the trial, and made part of the record, it would not avail herein, because consent can not give jurisdiction, but it should be noted, in justice to Senator Johnson, that the record shows, both by the pleadings of defendant and

the motions of defendant on the trial, the objections herein noted were substantially presented to the court, and that Mr. Johnson signed those pleadings, and assisted upon the trial without any offer upon plaintiff's part, of the alleged agreement now contained in the transcript. No plea to the jurisdiction was necessary—the case should have been dismissed.

Williams v. Nottawa, 104 U. S. 589.

M. C. & L. R. R. v. Swan, 111 U. S, 379,

construing the act of March 1, 1875, U. S. Stat. at Large, vol. 18, p. 470.

Under the rule of practice in Missouri it was necessary that the entire deposition should be read by the defendant.

Hill v. Sturgeon, 28 M. R. 323.

But defendant was not thereby precluded from offering, as was done in this case (see assignments of error, III and V.), to disprove, by other evidence, the contradictory testimony of plaintiff, elicited in his cross examination by his own counsel.

Chandler v. Flumer, 50 M. R. 239.

The record shows that defendant not only proffered this deposition, but also offered separately to prove (page 190, printed record) that plaintiff was not the owner of the coupons, and also was precluded (pages 190 and 223, printed record) from proving the allegations of the fourth count of its answer (page 171, printed record) to the effect that plaintiff and every preceding holder of the coupons described in the second count of plaintiff's petition received same without paying value therefor, and with actual notice of the several defences in said fourth plea set forth.

II.

The issue, clearly presented by defendant's fourth plea, and the evidence offered in support thereof, was whether any principle of commercial law, or any previous adjudication of this court, required the court below to disregard in favor of a bondholder who neither paid value nor claimed under any one who did, and who, with every preceding holder, took, with actual notice of lis pendens, the solemn adjudication of the Supreme Court of Missouri, declaring null and void every coupon herein sued on excepting that purporting to have been detached from bond number five.

The fourth plea of defendant (page 171, printed record) averred that neither plaintiff nor any previous holder of the coupons paid value therefor; that he and every preceding holder of said coupons received same with actual notice of the pendency of an injunction suit, instituted September 11, 1871, whereby the county authorities and their successors, and the Missouri, Iowa & Nebraska Railway Company, were enjoined, by a State court of competent jurisdiction, from delivering or placing in circulation the several coupons declared upon in the second count of plaintiff's petition.

That said case was pending until June 24, 1874, when the injunction was made perpetual, and the respondents and their successors in office ordered to deliver up for cancellation said coupons, and the bonds from which they were detached; that the case was appealed to the Supreme Court of Missouri, where the judgment of the lower court was affirmed Oct. T. 1878.

The opinion of the Supreme Court of Missouri in said case of Wagner v. Mety, 69 M. R. 150, is the best argument that can be offered in support of the point here made by plaintiff in error.

The record in that case (pages 191 to 215, printed record) showed, as the Supreme Court noted, a material change of route, a failure of consideration and a confession of facts, necessitating, as a condition precedent to any issue of bonds, an election of qualified voters, which was never held. As a bar to all this, defendant in error will probably here, (as he did in the court below), rely upon the ruling of this court in Thomas vs. Scotland County, 94 U. S. 695.

That case was submitted to this court, October term, 1875, upon stipulation and demurrer. The defenses set up in the defendant's fourth plea in this case, were not made in Thomas vs. Scotland County.

In that case it was confessed that the holder of coupons merged in Thomas' judgment was a *bona fide* holder for value. In this case defendant was precluded from proving the contrary.

The printed record in this cause shows conclusively that proof was rejected (page 190) showing that plaintiff was not the owner of either of the coupons sued on (pages 190 and 171); that neither plaintiff nor any preceding holder paid value for either of the coupons sued on (page 223, 171); that plaintiff and every preceding holder received the coupons sued on, with actual notice of the pendency of the aforesaid injunction suit of Wagner v. Mety, *et al.*

And that Henry Hill (page 223, printed record), the owner of many of the coupons sued on, actually joined in a bond to Mety, the county agent, who held the bonds whereby, in consideration of his delivering same, he was to be indemnified against the aforesaid and all other injunction proceedings; and that, according to plaintiff's own confession (pages 218, 217, printed record), said Henry Hill, and Thomas B. Hill, of Missouri, and others, owned many of the coupons sued on, and that plaintiff not only was unable to identify many of the coupons sued on, or to name the owner thereof, but was manifestly ignorant that his name had been used in suing for same. The point here made is

fully sustained in

Stewart v. Lansing, 104 U. S. 505,

Leslie v. Town of Urbana, 8th Bissell C. C. R. 437.

The State court having obtained jurisdiction in said case of Wagner v. Mety, long before any case was brought in the Federal Courts upon any bond or coupon of Scotland County, a State court interpretation of State statutes should, at least, control those who had notice of said suit and paid no value for their coupons.

III.

The court below should have sustained the demands of defendant for proof of authority for the execution of the coupon alleged, but not proven, to have been detached from bond No. 5 (page 188 of printed record), for proof of such detachment, and for proof of the authority for the execution, and the execution of the bond numbered 5, offered in evidence.

When the suits herein consolidated were instituted, the law of Missouri provided that when a suit was founded upon an instrument of writing therein filed, its execution should be taken as confessed, unless denied by verified answer. When the final pleadings in this case were made, and the case tried, counties were exempted from said obligation. It is unnecessary to inquire in this case as to which law controlled, because the point here made by plaintiff in error was admissible under either law.

The omission to make a verified answer of *non est factum*, did not dispense with proof of the authority of those purporting to have executed the bonds or coupons.

Carpenter v. Lathrop, 51 M. R. 483; 17 M. R. 326.
Thayer v. Montgomery, 3 Dill. 390.
Parsons v. Jackson, 99 U. S. 436.
Anthony v. Jasper County, 101 U. S. 699.
Dallas Co. v. McKenzie, 94 U. S. 662, 663.
Chambers Co. v. Clews, 21 Wall. 323.

Plaintiff, in the court below, did not prove or even plead in chief the facts essential to show authority in the County Court, as was obtained by stipulation in the case of Thomas v. Scotland County. In that case (94 U. S.), it was admitted that the Alexandria & Bloomfield Railroad Company accepted the peculiar law of Missouri, changing the name of said road, declared to be operative only after its acceptance. In that case proof was made of the consolidation of two companies, under the name of the Missouri, Iowa & Nebraska Railway Co. All these facts were placed in issue herein by the separate pleadings to the first count of plaintiff's petition. Nothing was proven, or in any wise admitted, by which the coupon declared upon in the first count of plaintiff's petition could be identified with the transactions referred to in the pleadings concerning the remaining coupons described in the second count of plaintiff's petition, and the answer to said count. The printed record (page 164) shows a separate answer to the first count of plaintiff's amended petition, which certainly placed upon him the burthen of proving the detachment of the coupon, and both the execution and the authority for the execution of the bond.

The court below manifestly erred in applying to this count of plaintiff's petition the admissions contained in the second, third and fourth pleas of defendant's answer, because whatever may have been the effect thereof, they were not directed to the first count, wherein a separate cause of action had been stated, and a separate issue clearly made by defendant, for the express purpose of obtaining, in a single case, a final adjudication of various defences, which could only be made by such distinct pleadings.

Aside from this fact, this coupon, and all others offered, merely bore a lithographic signature, "S. McDonald, *County Clerk*" (page 188, printed record).

This court, judicially noticing the laws and judicial decisions of the several States of the Union (Pennington v. Gibson, 16 H. 65), is advised of the fact that there is no such

officer known to the laws of Missouri as a "County Clerk." The County Court is not a general, but a limited agent of the County.

Reardon v. St. Louis Co., 36 M. R. 555 (1865).

The clerk of said court is designated as "Clerk of the County Court." (General Statutes of Mo., 1865, page 174, §§ 6 and 7.) The title is certainly not *idem sonans* with that of "County Clerk," nor was any plea or proof made that the clerk of the county court was ever known or designated by the other title. In Colorado and other States there are distinct officers under each of these titles.

The authorities are conclusive to the effect that even a *bona fide* purchaser must inquire as to the authority of the agent purporting to execute the instrument.

Anthony v. Jasper Co., 101 U. S. 669, affirmed in Huff v. Jasper Co., 110 U. S. 53.

All that has been said concerning the coupon purporting to have been detached from bond numbered 5, applies with even greater force to the error of the court below in admitting the pretended bond numbered 5, in evidence against defendant's objections; it was not sued on nor filed in the case, no proof was made as demanded that any coupon sued on was detached from said bond. Without such proof, under the answer of defendant to the first count, it was incumbent upon plaintiff, not only to prove the authority for the execution of said bond, but the *fiectum* of said bond.

If what has been herein set forth is a sufficient demonstration of the errors of the court below, set forth in the first and second assignment of errors, it necessarily establishes the correctness of the eighth assignment of errors.

IV.

The 12th section of the act incorporating the Alexandria & Bloomfield Railroad Company, now, for the first time, submitted for the consideration of any court, made all of the general railroad law (excepting sections 9 and 10, which merely related to liability of stockholder and increase of capital stock) part of said charter. Only one other charter in Missouri contained such a provision; it was construed in 1868. The settled law in Missouri at the date of the contracts herein, and at the present, was, and is, that said incorporation of the general railroad law not only precluded the issue of bonds bearing more than seven per cent, but so modified the previous sections of charter as to make an election a condition precedent to the issue of the bonds.

In 1851, when the charter of the North Missouri Railroad Company was granted, there was no general railroad law. In each of the cases wherein bonds issued under special charter power have been held valid without the condition precedent of an election, there has been a charter containing language similar or identical with section 14 of the North Missouri charter, and an utter absence of words showing that the general railroad law should apply. Because of the absence of such apt words have these powers been held to rise above the restrictions of the general railroad law. Certainly apt words were used in the 12th section of the Alexandria & Bloomfield charter.

The only similar case ever passed upon by the Supreme Court of Missouri was that of Leavenworth & Des Moines Railroad Co. v. Platte Co., 42 M. R. 169, Jan'y term, 1868. The charter in that case involved, (Laws of Mo., 1859–60, p. 443,) contained, in sec. 6, a literal copy of sec. 14 of the charter of the North Missouri Railroad Co., as set forth at p. 11 of statement. After granting unrestricted power to county courts to subscribe and issue bonds, the eighth section proceeded, as in the charter of the Alexandria & Bloomfield

Railroad Company, to make the general railroad law applicable. The court, without a dissenting voice, declared that the sixth section was modified and controlled by the eighth section, and that, although there was power under the sixth section, standing alone, to make subscriptions and issue bonds without the condition precedent of a vote, the subsequent section made the restrictions of the general railroad law applicable, and a vote was necessary. This decision was made after the case of State v. Macon County Court, 41 Mo. R., and was declared not to be in conflict with it.

In the case of Smith v. Clark County, 54 M. R., the record shows, page 65, that the case was submitted upon an agreed statement, which carefully excluded section 12 of the Alexandria & Bloomfield charter, and much of the first opinion of the court is directed to the demonstration of the proposition that the general railroad law and the constitution of 1865 were not intended to repeal the only special charter power considered by the court, viz: section 14 of the North Missouri Railroad charter. What necessity for such discussion could have existed if the agreed statement had shown that, in truth, section 12 of the A. & B. charter made part thereof, all of the general railroad law (excepting two unimportant sections). Another fact, which should be borne in mind in considering the case of Smith v. Clark County, is, that the bond in that case (page 62), recited that it was issued under the *provisions of the general railroad law;* that the bond bore seven per cent interest, and was issued January 1, 1865, at a time when the court (page 80), shows that the settled law of Missouri was that such recital estopped the county as against an innocent holder. When the Scotland County bonds were issued and delivered, Sept. 20, 1871, the settled law of Missouri was (as is conceded in Smith v. Clark County) that recitals did not estop the county as against *bona fide* holders.

State vs. Saline County, 45 M. R. 249 (Jan. 1870).
Steines vs. Franklin County, 48 M. R. (March, '71.)
See, also, Carroll vs. Smith, 111 U. S. 556.

The case of Smith v. Clark County was not decided till 1873, two years after the making of contracts herein involved. All relevant cases which had been decided in September, 1871, are analyzed in an appendix at page 40 of this brief.

Even against a *bona fide* holder the law as interpreted when the contracts were made, controls.

Ohio Life and Trust Co. v. Debolt, 16 How. 432.
Burgess v. Seligman, 107 U. S. 33.

This case, reported in 42 M. R. 169, was the settled law of Missouri when the contracts herein involved were made, and not only established the proposition that the general railroad law formed part of the charter, but that all amendments of said general railroad law entered into and became a controlling part of said charter. Under this decision, even the provision of the General Statutes of 1865, requiring a two-thirds vote, might have became part of the charter, but if said law of 1865 was merely intended to aid a prospective provision of the constitution, the supplemental law of 1861, p. 13-14 of statement, certainly was intended to enter into and become a part of the general railroad law already forming part of the charter. That supplemental law was not repealed in 1870. Its provisions for an election of resident voters qualified to vote for State and county officers, was entirely consistent with the 3rd section of article 2 of the Constitution of 1865, which the court, in 41 M. R. 462, intimate was the provision they intended to mention instead of sec. 11 of article 11, which they certainly did declare, in 39 M. R. 488, was repugnant to a previous special charter power.

I defy opposing counsel to cite a case decided by the Supreme Court of Missouri prior to or at the date of the contracts herein, which did more than decide that subsequent, general and organic statute law, could not, by implication or without apt words, repeal a separate act conferring on corporate authorities unlimited power to subscribe stock or issue bonds. Another section of the general railroad law in force in 1855, which entered into the A. & B. charter,

and which was neither altered nor amended prior to 1875, was section 33 of said law, page 15 of statement, limiting interest on bonds issued thereunder to seven per cent. per annum. The Supreme Court of Missouri has, without conflicting decisions, declared that sec. 33 limits interest on all bonds issued under the general railroad law to seven per cent. per annum, but that only in a special charter power wherein no reference was made to the general railroad law, a higher rate of interest was lawful. The record herein shows that defendant in the court below was precluded from offering proof showing failure to hold election of qualified voters or resident voters, or taxpayers (printed record, p. 190), and that in the injunction suit, of which plaintiff and all other holders of bonds and coupons had actual notice, such omission to hold election was confessed by demurrer.

V.

If the power to create the obligations sued on was to be found only in the 10th section of the act incorporating the Alexandria & Bloomfield Railroad Company, which provided that said company should in all things be subject to the same restrictions and entitled to the same privileges which were granted to the North Missouri Railroad Company in 1851, there was no authority in the County Court of Scotland County to levy special taxes to pay bonds issued solely under such power. The law conferring the authority and the general laws in force on the 9th of February, 1857, clearly manifest a legislative intention to limit the payment of such bonds to the general county fund, and such limitation should have entered in the judgment in this case.

Plaintiff in error is bound to concede that it is the settled law of this court that a power like that contained in the fourteenth section of the charter of the North Missouri Railroad Company (page 11 of statement), standing alone and unmodified by correlative provisions, authorized the issue of

bonds without a vote of the qualified voters, and that it is also the settled law of this court that the power to create such a debt implies the obligation to levy taxes sufficient to to pay same, "unless, in the charter, or in some contemporaneous general law, a contrary legislative intention was shown."

When the North Missouri Railroad Company was incorporated, in 1851, there was no general railroad law. The first attempt to enact a general railroad law was made in 1853, which was succeeded by that of Dec. 13, 1855, referred to in section 12 of the Alexandria & Bloomfield charter. It is part of the history of the State, confirmed by numerous laws upon its statute books, that every county subscription to the North Missouri Railroad Company, prior to the adoption of the general railroad law, was paid either in cash or by bonds bearing six per cent annual interest, a greater rate of interest being then usurious (Laws of 1847, page 63). Said subscriptions were undoubtedly made without a vote of the people. It was soon found difficult to pay same out of the surplus funds of the county; thereupon, from time to time, acts were passed authorizing particular counties to levy special taxes to pay said bonds. In the general railroad law, revised for the last time in 1865, and therefore inapplicable to any subscription made after said date (R. S. Mo. 1865, page 883), a provision was inserted in the Laws of Missouri, Sec. 34, page 15 of statement, "that any county which has *heretofore* subscribed stock, etc., shall have all the rights and powers to provide funds to pay such subscriptions as are granted to county courts by this act," the opinions of the law-makers and the uniform decision of the courts being that said section was to be construed with the correlative sections 30 and 31, which always required the condition precedent of an election of tax-payers or qualified voters; the legislature continued up to February 9, 1857, to pass laws authorizing counties to levy special taxes to pay bonds issued to the North Missouri Railroad Company, without a vote as required by the general railroad law.

The record in the much-cited case of Barrett v. Schuyler County (44 M. R., page 201), shows that in December, 1854, Schuyler County subscribed to the stock of the North Missouri Railroad Company; convinced that neither the special charter power, nor, in the absence of an election, the general railroad law, conferred power of special taxation to pay bonds issued for that subscription, the legislature of Missouri, by a law dated December 13, 1855 (Laws of Mo., 1855–6, p. 47), authorized the county court of Schuyler county to borrow money to pay said subscription previously made, and to levy a special tax to pay the interest on said bonds, if it was deemed more expedient to pay same by direct taxation.

The statement herein (page 16) shows that on the same day that the legislature enacted the charter of the Alexandria & Bloomfield Railroad Company, the general railroad law referred to in the 12th section of said act was amended by granting the county of St. Louis power to levy special taxes to pay bonds previously issued, in 1856, by said county, to the North Missouri Railroad Company. This being a year after the taking effect of the general railroad law of 1855, the 34th or "heretofore" section of that law manifestly could not be invoked.

Certainly this amendment of general law all specifically incorporated in the charter of the Alexandria & Bloomfield Railroad Company affected all claiming under charter, with notice that on the day it was granted, the Legislature of Missouri had said: "We grant you, as you ask, the restrictions and privileges of the North Missouri charter of 1851, but by section 12 of your charter we exempt you from the operation of only two sections of the general railroad law, this day amended. In that amendment we clearly concede the fact that, as we interpret the 14th section of the charter of the North Missouri Railroad Company, there is not contained therein power to levy, during five years' time, a sufficient sum of money to pay bonds issued to said company. We recognize the fact that in the general railroad law only

is to be found power for such special taxation. We have helped said company and county this time by authorizing special taxation under the terms of said law, but hereafter no bonds must be issued to any company, in said county, without a vote of qualified voters who pay taxes on property."

In an appendix I print a synopsis of every relevant decision of the Supreme Court, arranged in chronological order, for convenient reference.

HENRY A. CUNNINGHAM,

Attorney for Plaintiff in Error.

APPENDIX.

Synopsis of adjudications of Supreme Court of Missouri concerning county subscriptions to railroad companies made prior to date of contracts herein:

In St. Louis v. Alexander, 23 M. R. 483, where the city did not seek to be released, but, on the contrary, was setting up its rights as a stockholder, the court merely declared a special provision in act of March 1, 1851 (Laws of Missouri, 1851, p. 726), that the city might subscribe to the O. & M. R. R. Co., "*anything in its charter to the contrary notwithstanding*," was not repealed by another act which merely reduced into one act the laws governing the charter of the city of St. Louis and provided that the city should not become a stockholder in any corporation. This identical section was shown to have been in the charter during several revisions, extending over many years, and the court virtually held that as to said section the Act of March 3, 1851, *was not a later law*, but merely a revision of a long existing law, which could not, under such circumstances, be held to indicate an intention upon the part of the Legislature to repeal a privilege granted only two days before.

In the case of Han. & St. Jo. R. R. Co. v. Marion Co. 36 M. R. 294 (1865), there was a charter of 1847, amended February 23, 1853, with a *curative act validating all subscriptions, etc.* The general railroad law was not involved.

Flagg v. Palmyra, 33 M. R. 440 (1863), involved bonds issued, not by a county court, but by a complete corporation, afterwards overruled as to a point concerning conditions precedent of election, etc. 42 M. R. 169, 1868; 45 M. R. 249; 48 M. R. 169, 1871; 51 M. R. ; 54 M. R. 58.

In February, 1867, the Supreme Court had, in St. J. R. R. Co. v. Buchanan County Court, 39 M. R., at pp. 488-489, distinctly and unequivocally declared that the Constitution of 1865, forbidding subscription of stock to railroad com-

panies without a vote of two-thirds of the qualified voters, modified a previous special law inconsistent therewith.

In October, 1867, the same court held that the same constitutional provision which was *declared applicable, in 39th M. R. 488*, to laws *existing at the time of its adoption* was a limitation only upon the future power of the General Assembly, and that a provision similar to that contained in the charter of the North Missouri Railroad of 1851, was not repealed by or repugnant to the 14th section of 11th article, or the R. S. of 1865.

State v. Macon County, 41 M. R. 462.

The court, in this case, explaining the decision in 39th M. R. 489, say: "The order of the court submitting the proposition to be voted on by the people of Buchanan county, attempted to conform to the provisions of the Constitution as to qualified voters, and to the act of the legislature as to taxable inhabitants, but really was not in compliance with either, and thus was held illegal and void. This was the very point adjudged, and nothing more. Upon the whole, our conclusion is that the 14th section of the 11th article of the Constitution is a limitation upon the future power of the legislature, and was not intended to have any controlling application to laws in existence when the Constitution was adopted."

Of course the court could, in 41st M. R., overrule the decision in 39th M. R., but, with due deference, I deny that *it* could to any extent control the effect of said decision by averring in the later decision that "this very point *was* adjudged, and nothing more."

In Barrett v. Schuyler County, 44 M. R. 201, decided in March, 1869, the bonds were issued under a charter of the N. M. R. R. of 1851, aided by an act authorizing levy of special taxes to pay said bonds. Laws of Missouri 1855–6, p. 47.

In January, 1868, the Supreme Court of Missouri, in L. & D. M. R. R. Co. v. County Court of Platte County, 42 M. R 169, declared that the word "may," in the 30th sec-

tion of the railroad law of 1855, must be interpreted to mean "shall;" that "it is a power given to public officers, and concerns the public interests and the rights of the third parties, who have a claim *de jure* that the power shall be exercised in this manner for the sake of justice and the public good; and that the act *passed* January 14, 1861, *ten days after* the charter to the L. & D. R. R. Co., may be taken, not as an amendment, but *as declaratory of the true meaning* of the act of 1855; and that section 30 of the act of 1855, as modified, still applied to the L. & M. R. R. Co.

In October, 1869, 44 M. R., 553, C. & B. R. Co. v. Brunswick, the decision in 41 M. R. was affirmed in an uncontested case.

In January, 1870, the Supreme Court of Missouri, State v. Saline County Court, 45 M. R. at page 249, declared the law to be: "From the nature of the case counties can only make contracts when authorized, and *as authorized*, by law; individuals may waive irregularities by subsequent assent, but on behalf of the taxpayers there is no one authorized to waive anything."

In February, 1871, in R. C. R. R. Co. vs. Alderman, 47 M. R. 349, the 14th section of the 11th article of the law of 1865 was again declared prospective.

The established law at the date of the issue of coupons sued on, was that if any law provided for a subscription to test the sense of taxpayers or qualified voters, such provision was a condition precedent to the exercise of power, and must be shown affirmatively, and that a specific adoption of general railroad law by apt words in a charter modified and controlled the previous sections of the charter, and made an election necessary.

Steines vs. Franklin Co., 48 M. R., 169, 1871.
State vs. Saline Co., 45 M. R. 249, 1870.
42 M. R. 169, 1868.
L. & D. R. R. vs. Platte Co. Court.

When the coupons sued on were issued, only section 17,

chapter 62, in the General R. R. Laws of 1865, substituted for section 30 of the original, of the R. C. of 1865, had been interpreted by the Supreme Court of Missouri. The original section 30, made applicable to charters granted after 1853, had not been interpreted, except in 42 M. R. 169, 1868, and there in our favor.

This court is not bound by any State court decisions made after the issue of bonds, nor by any decisions not clearly relevant.

Since the issue of these coupons, all that the Supreme Court of Missouri has decided is that the 62d chapter of the R. C. of 1865, and other general acts subsequent to a charter, do not repeal a special power.

State vs. Sullivan County, 51 M. R. 530, 1873, involved a charter, including that of H. & S. of R. R. of 1849, and another of 1837, included in H. & S. charter. The General R. R. Law of 1855 did not apply to it—only the constitution of 1865 was construed.

In citing Smith vs. Clark County, 54 M. R. 62, courts have sometimes overlooked the fact that the bonds in that case actually recited that they were issued under the general railroad law of 1855 (54 M. R., p. 62), and bore 7 per cent. interest, and that court held that under the law, as settled in January, 1865, the recital estopped the county, as against an innocent holder, but that after 1870 the contrary was the settled law of Missouri. Moreover, the agreed case, page 65, shows that section 12 of this charter, making general railroad law applicable, was not submitted for the consideration of the court, and that it was admitted that the bonds were issued under the special charter power in 1864, before the taking effect of the constitution and revised statutes of 1865. That court, upon motion for rehearing, at page 80, distinctly declared that there was nothing in the opinion which intimated that power to county courts, in special charters, were privileges which might not have been repealed or modified, either under the State constitution of 1865 or that of 1820, thereby affirming a doctrine recognized in

State vs. Macon County, 41 M., p. 458, 1867.

The decision in Smith vs. Clark County, was made in 1873, long after the contracts merged in the judgment in this case. The ruin which it has already wrought, resulted, not so much from what it decided as from what it erroneously assumed to have been previously adjudicated. I do not believe that it is in the power of any one to produce a Missouri decision made prior to 1873 which did more than declare, as in 41 M. R., 458, that, although the power of county courts to subscribe stock and issue bonds, contained in special charters, might be modified or repealed by apt words, it was not intended to repeal such power by the organic and statute laws of 1865.

Although Judge Napton alone, in 54 M. R., 58, intimated that the general railroad law of 1855, even when made applicable, might not require a vote of the tax payers as a condition precedent, the settled law then, and when the contracts herein were made, was otherwise. [L. & D. M. R. R. Co. vs. Platte County Court, 42 M. R., 171, 1869.] More millions have been invested in real estate upon faith in the latter decision than have been or ever will be invested in county bonds.

The subsequent decisions of the Supreme Court of Missouri, up to the present time, are entirely in favor of plaintiff in error. The very instruments sued on in second count of plaintiff's petition described were adjudged void in Wagner vs. Metz, 69 M. R. 150, October, 1878. Not even in that case was the 12th section of the Alexandria & Bloomfield R. R. Company considered by the court; but the case submitted upon pleadings which omitted all reference to said section 12.

In the Supreme Court of the United States.

October Term, 1884.

THE COUNTY OF SCOTLAND,
PLAINTIFF IN ERROR,

vs.

WILLIAM HILL,
DEFENDANT IN ERROR.

No. 32.

Reply of Plaintiff in Error to Supplemental Brief of Defendant in Error.

There is so much danger that in the haste incident to the submission of cases like this the Court may accept as unquestioned the averments made in the supplemental brief of defendant in error, that plaintiff in error submits a reply to said supplemental brief.

I.

One of the grounds upon which the Supreme Court of Missouri sustained the injunction suit filed September 11, 1871, (of which defendant in error had actual notice,) in no wise conflicts with the decision of this Court in Thomas *vs.* Scotland County, but is in harmony with all rulings of this Court and those of the Supreme Court of Missouri at the date of the contracts herein involved, and that is the point shown by the following quotations from printed record:

Page 197: "Plaintiffs state that said Company soon thereafter adopted the first section and no other of said last-named act, (Laws of Mo. 1866, 222,) and did permanently locate the same road, commencing at the said town of Alexandria, running thence in the direction of Bloomfield aforesaid through said Scotland County, striking said Missouri and Iowa line some ten miles east of the northwest corner of said Scotland County."

Page 198 of printed record shows that the Missouri, Iowa, and Nebraska Railway Company, in its articles of consolidation, duly accepted and adopted said route; and at page 201 it is shown that said Missouri, Iowa, and Nebraska Railway Company, without authority of law, abandoned the line of said road as located and partly graded, in order to obtain the subscription which the County Court of Scotland County, in pursuance of the unlawful agreement recited, were to pay for same, either by a levy of taxes or issue of bonds, and that said change of said line is a change of the general route agreed upon and adopted by the Missouri, Iowa, and Nebraska Railway Company, "and that said change was not made to shorten the line of said road or to overcome natural objections thereto, or to secure economy in its construction; and plaintiffs further aver and charge *that* said *line* was not *changed* as aforesaid by a vote of *two-thirds* of the *directors* of said Missouri, Iowa, and Nebraska Railway Company."

If, as I shall hereinafter show, it was unlawful to make said change of route without a vote of *two-thirds* of the directors of said Company, then it would follow that the funds of Scotland County would have been invested in an unlawful enterprise, which, after great expense had been incurred, might have been enjoined, and the Company compelled to return to the graded line upon which they had already wasted other stockholders' money.

It might well be held that inasmuch as the demurrer confessed the allegations of said petition, which, in so many words, alleged that "said change was made without warrant or authority of law," it is not incumbent upon plaintiff in error in this case to point out wherein the law was violated, but I, nevertheless, take the precaution of so doing.

In 1851, under the restrictions and privileges of the North Missouri charter, the 14th section of which was a copy of the Pacific Railroad Charter, (laws of Mo., 1849, page 222; laws of Mo., 1851, page 483,) a change in the route of any road could only be made by an act of the Legislature. Neither the charter of the North Missouri Railroad Company nor that of the Alexandria and Bloomfield Railroad Company contained any such provision, except by reference in sec. 12 of the latter to the general railroad law, making same part of charter. Whenever the terms of the general railroad law were not repugnant to the special charter power, the Supreme Court of Missouri, as early as 1856, recognized that the provisions should apply, whether made part of the charter or not. (Peters *vs.* J. M. R.R. Co., 23 M. R., 107.)

The law (General Statutes of Mo., 1865, sec. 13, page 337; R. S. of Missouri, 1855, page 423, sec. 24) has always prohibited any change of route without the assent of two-thirds of the Directors of the Railroad Company. Said section 13 reads as follows:

"The Directors of any Company under this chapter may, by a vote of two-thirds of their whole number, at any time change the road-bed or road-line, or any part thereof, for the purpose of shortening the line, so as to overcome natural objections thereto; but nothing in this section shall authorize said Company to change the general route or terminus of said road or any part thereof."

Not only did the demurrer in Wagner *vs.* Mety confess that there was *not* a vote of two-thirds of the Directors, but also confessed an absence of compliance with all the conditions upon which even such a vote might legalize a change of line. (Printed Record, p. 201.)

It is true that in some of the grounds upon which said injunction was made perpetual the Court followed the case of Garrovite *vs.* Green County, (67 M. R.,) which overruled the decision of a majority of the Court in State *vs.* Green County, (54 M. R., 1873,) followed by this Court in Thomas *vs.* Scotland County. As to these points I can only say that the decision thus overruled was made two years after the date of the contracts herein, and that, as shown in my first brief, the law, as settled by the Supreme Court of Missouri at the date of the contract herein, was in our favor, but for reasons not shown by record in other cases. Moreover, that in the suit against Mety, a State Court of competent jurisdiction had obtained jurisdiction in September, 1871, before any suit was ever brought in a Federal Court or any relevant adjudication there made, and that the record cited in said first brief shows that plaintiff, and every preceding holder of the coupons sued on in plaintiff's second count, received same with actual notice of the pendency of said suit, and without paying value therefor; and that, under the rulings of this Court in Scipio *vs.* Wright, (101 U. S., 665,) and Stewart *vs.* Lansing, (104 U. S., 505,) the judgment of the State Court should be respected.

The offer of defendent "to prove orally that Wm. Hill, the plaintiff, and each preceding holder thereof, received the instruments sued on, with actual notice of the pendency of aforesaid suit of Levy Wagner *et al. vs.* Mety *et al.*, (printed record, page 223,) was sufficient in law. In Missouri such practice has long been sanctioned and commended by the Supreme Court as abbreviating the record. If admissible

in a State court, like the Supreme Court of Missouri, where the entire evidence may be re-examined upon appeal, how much more reasonable is its application in a writ of error where only the declaration of law or rulings of the Court in the progress of trial are considered? (Carter *vs.* Holman, 60 Mo., 498; Walls *vs.* Gates, 4 Mo. Appeal Reports, 1.)

If it was necessary to name the witness, it will be seen that it was done in the offer to prove orally by Charles Mety (page 223) the same facts hereinbefore discussed, and that proof of execution of the indemnifying bond of Henry Hill (owner of many coupons sued on by Wm. Hill, his brother) was rejected. (Page 223, printed record.)

The question raised in the supplemental brief of defendant in error, as to whether the first order made in Wagner *vs.* Metz, September 20, 1871, was not a temporary injunction, but a restraining order, or as to whether there was a temporary injunction at all, should have no weight in view of the conceded facts; that the proper officers and persons were made respondents; that there was a final decree in a suit instituted September 11th, 1871, and that plaintiff, and every preceding holder of the instruments sued on in second count of plaintiff's petition, received same with actual notice of the pendency of said suit.

III.

As to Wm. Hill's deposition. In refutation of the assertion that T. B. Hill, of St. Louis, is not shown to have owned the coupons sued on, at the date of the institution of suit, I quote the following portions of Hill's deposition, omitted by defendant in error, (p. 219, printed record:) "I bought them all, but I knew where they were going at the *time I bought them.*"

Page 216, printed record: "I own eighteen bonds. The

coupons sued on in this suit, in which I am interested, came from these 18 bonds. The amount that I am personally interested in is over $4,500, not including interest on coupons."

Page 217, printed record: "The most of them have been bought of Gaylord, of St. Louis, and Tobey & Co., of New York; bought from Gaylord & Co. fifteen to twenty thousand, (each bond was for $1,000,) and from Tobey & Co. from thirty to forty thousand. I do not own all of these bonds now. I own a few coupons which were not detached from the bonds—about half of nine hundred dollars—bought about a year ago."

Page 217: "The proportion of the bonds sued on belonging to the bank is from eleven to twelve thousand dollars. *The bank purchased the bonds* mostly, I think, from Tobey & Co. I do not know who the bonds came from to Tobey & Co. George S. Knox owns, I think, 16 bonds and coupons detached therefrom, which are included in this suit, in addition to his half interest (in nine hundred dollars) above referred to. James B. Dodge, I think, owns four bonds, and has about the same proportion of coupons sued on, amounting to something like nine or ten hundred dollars. Thomas B. Hill, of St. Louis, Mo., has four bonds, I think, and has about the same interest with J. B. Dodge."

Page 218, printed record: "Thomas B. Hill owns bonds numbered 32, 33, 34, 153, 154, 155, 156, 157; coupons in suit amounting to $1,920."

The court will observe that Wm. Hill does not pretend to have purchased all the bonds from which coupons sued on purported to have been detached. He only remembers a total purchase of 45 to 60 bonds of $1,000 each. (Page 217.) He mentions (page 217) that the bank "*owns now* 27 bonds," (the numbers of which are given on page 218,) and states unequivocally that "the bank purchased them mostly from Tobey & Co., of New York," when it is noted that he used

these words, "owns now," in reference to bonds which he does not pretend to have purchased at all, the weight of a similar use of words, as quoted by defendant in error, is manifestly diminished.

The suit involved coupons from 158 bonds of $1,000 each, of which Wm. Hill only claimed to have purchased 45 to 60, and only identified in any way as owned by himself or anybody else 106 bonds.

But we were not confined to plaintiff's deposition. We offered to prove (printed record, page 190) that plaintiff was not the owner of any of the coupons involved in this suit, in order to present the point that the suit was not prosecuted in the name of the real party in interest.

Although the first of the suits afterwards consolidated was instituted (as stated by defendant in error) January, 1878, the second was instituted August, 1878, and this consolidated petition, which declared upon many coupons, including some of Thomas B. Hill's coupons, not mentioned in either of the consolidated cases, was filed January 29, 1879, only a few weeks before Wm. Hill's deposition was taken.

IV.

The recollections of counsel for defendant in error, concerning the circumstances attending the action of the Supreme Court of Missouri, and the request of securities for a release, (49 M. R., p. 147) are not confirmed by the report of that case, or the record in this case, and therefore can have no weight as authority. The assertion of defendant in error, that the questions of excessive judgment and fraud upon the jurisdiction were not brought to the attention of Judge Treat, who tried the case below, is conclusively refuted by the motion in arrest of judgment (page 225, printed

record,) but it was not necessary so to do. (Williams *vs.* Nottana, 104 U. S., 589.)

The printed record, page 224, shows that the Court declared the law to be that "under the pleadings there were no facts which it was necessary to have found," and, therefore, subject to exception of plaintiff, refused to make a special finding of facts. That this ruling was erroneous is shown by this Court in the Francis Wright case. (105 U. S., 387.)

Smith *vs.* Clark County, (54 M. R.,) as well as State *vs.* Greene County, (54 M. R.,540,) was decided two years after the contracts herein. In the analysis of said case, pages 34 and 43 of my first brief, I have endeavored to show that it cannot be used as an authority against plaintiff in error.

State *vs.* Greene County (54 M. R., 540,) merely refers to Smith *vs.* Clark County as declaring that the right to subscribe, &c., (14 section N. M. charter,) was a privilege, whereas the final opinion on page 80 of Smith *vs.* Clark County asserted that there was nothing in the charter which might not, by apt words, be repealed.

The case of State *vs.* Wilson, (49 M. R., 147,) cited by defendant in error, merely decided that a mandamus did not lie to control the direction of an inferior judge.

The case of Scotland County *vs.* M. I. & N. R.R. Co. (65 M. R., 123) merely decided that section 9 of the charter of the Alexandria and Bloomfield R.R. Company, exempting stock from taxation for twenty years, was not repealed by a general provision in the constitution of 1865, providing that no property should be exempt from taxation, and was not repealed by a revenue law of 1871. The sections of general railroad law mentioned in opinion are merely referred to *arguendo;* but if the contrary was true said decision made in 1877, upon the inevitable "agreed statement of facts," cannot control this case, because sec. 12, making much of the

general railroad law part of the charter, was not considered by the Court, and because the settled law at the date of the contracts herein was that the North Missouri charter copied from Pacific charter (laws of Mo., 1849, 222, sec. 14; laws of Mo., 1851, 483, sec. 14) was subject to alteration, amendment, or repeal. (Pacific R.R. Co. *vs.* Renshaw, 18 M. R, 210.) One ground for the rulings of this Court in Thomas *vs.* Scotland County, (94 U. S.,) and Thomas *vs.* Schuyler County (98 U. S.) was the recognition of said right to alter or amend said charter.

The authorities cited in my first brief, especially that of L. & D. R.R. Co. *vs.* Platte County Court, (42 M. R., 191,) the law controlling, when contracts were made, would seem a sufficient set-off to the alleged effect of the decision in 65 M. R., (1879.) If that decision, made thirteen years after the contracts herein, may control same, what pretext can there be for refusing the authority of Garroute *vs.* Greene County, (1877,) (67 M. R., 445,) which declares, *ultra vires*, every county bond issued during the past quarter of a century without a previous vote of the people consenting thereto.

Nothing said in the supplemental brief of defendant in error concerning the failure to prove authority for execution of coupon sued on in first count, and its detachment from any bond, shakes the argument made in my first brief, and I am contented to abide by what I have there shown.

It is true that in certain special charter powers not controlled by Sec. 20, general railroad law (G. S. Mo., 1865, 348,) it has been held that a bond might bear ten per cent., but upon authority of laws of Mo. (1857, p. 18,) which in its second section makes it unlawful for any country to issue bonds without first taking a vote of the tax-payers as to whether subscription should be paid by direct taxation, this law is a powerful authority in favor of the point that

the judgment herein should have contained a limitation as to taxation, but under the restrictions controlling the North Mo. charter in 1851 it was usurious to make a bond bear more than 6 per cent. (Law of Mo., 1847, page 143.)

State *vs.* Green County (54 M. R., 544) involved the charter of K. C., Galveston & Lake Superior Railroad Company. (Laws of Mo., 1856–'7, p. 162.) That charter contained no section referring to general railroad law, but a power like that of the North Missouri. (Charter, sec. 14.) The first section of the Alexandria and Bloomfield charter subjected Directors to State laws in making all ordinances and by-laws. (Laws of Mo., 1856–'7, 94.)

Alleged agreement of Mr. Johnson is not included in the bill of exceptions, and does not form part of the Record. (Eystia *vs.* Capelle, 61 M. R., 578; Stevenson *vs.* Saline County, 65 M. R., 425.) If it did, consent could not give jurisdiction. He assisted on trial, and signed pleading, (p. 224,) wherein I made that point. Plaintiff in error is not legally or morally bound by said alleged agreement.

Only three hours' time has been given me within which to prepare this hurried reply, made merely from recollection of the manuscript of the supplemental brief of defendant in error, and it may be that I have omitted reference to some points made therein. If so, I shall endeavor to answer them upon oral argument.

HENRY A. CUNNINGHAM,
Att'y for Plaintiff in Error

112-183

In the Supreme Court of the United States.

October Term, 1884.

THE COUNTY OF SCOTLAND,
PLAINTIFF IN ERROR,

vs. } *No.* 32.

WILLIAM HILL,
DEFENDANT IN ERROR.

Supplemental Brief of Plaintiff in Error, Containing Additional Relevant Statutes.

Among the restrictions of the charter of the North Missouri Railroad Company, besides those previously noted, were the following: (Revised Statutes of Mo., 1855, p 371, sec. 7.)

The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal in the discretoin of the legislature. Sec. 13. In all corporations hereafter chartered by the legislature, unless otherwise specified in their charter, in case of deficiency of corporate property, the individual property, &c., of every member of the body politic shall be liable to be taken on execution to an additional amount equal to that of the amount of his stock, and no more, for all debts of the corporation contracted during his ownership of such stock.

Sec. 1 of said N. M. R.R. charter (laws of Mo., 1851, p. 483) limited the capital stock to six millions of dollars. Manifestly repugnant to said charter were sections 9 and 10 of "an act to authorize the formation of railroad associations and to regulate the same." Approved Dec. 13, 1855. (R. S. Mo., 1855, 425.) Sec. 9: In case the capital stock of any company formed under this act is found to be insufficient for constructing and operating its road, such company may, with the concurrence of two-thirds in amount of all its stockholders, increase its capital stock from time to time to *any amount* required for the purposes aforesaid.

Sec. 10: Each stockholder of any company formed under this act shall be individually liable to the creditors of such company to an amount equal to the amount unpaid on the stock held by him for all the debts and liabilities of such company until the whole amount of the capital stock so held by him shall have been paid to the company, and all the stockholders of every such company shall be *jointly* and *severally* liable for *all the debts* due or owing to any of the laborers or servants for services performed for such corporation, but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation, and then the amount due on such execution shall be the amount recoverable with costs against such stockholders. These were the two sections of said general railroad law from which the law-makers of Missouri deemed it necessary, by a special section, 12, to exempt the stockholders of Alexandria and Bloomfield Railroad Company because the previous section 10 of said A. & B. granted only the privileges and restrictions of the North Missouri charter of 1851, "so far as they are applicable to the company hereby created." The legislature only intended them to be applicable in so far as they did not conflict with that general railroad law by Sec. 57 of which (page

15 of this brief) was declared part of every charter thereafter granted, unless inconsistent with specific provisions of such charter.

They knew that Sec. 55 of that general railroad law required every company to finish its road within five years after organizing, and that section 12 of the North Missouri charter of 1851 allowed twenty years for the completion of its road, and yet they deemed it necessary, by section 11 of the charter of the Alexandria and Bloomfield Railroad Company, to grant them specifically a lesser period of ten years' time, notwithstanding the separate section which the courts (long after the date of contracts herein involved) declared to import all the privileges and restrictions of the North Missouri Railroad charter of 1851. Why this separate section if the legislature had not conceded, as elsewhere shown, that the A and B charter was subject to and altered by the general railroad law? They knew that one of the restrictions of the North Missouri charter was that its stock should be taxable. Therefore they enacted by section 9 of the Alexandria and Bloomfield charter that it should be exempt from taxation for twenty-five years.

Sec. 8 of charter of Alexandria & Bloomfield Railroad Company (laws of Mo., 1856–7, 94,) reads as follows:

"Said Company shall have full power to survey, mark out, locate, and construct a railroad from the city of Alexandria, in the county of Clark, in the direction of Bloomfield, in the State of Iowa, to such point on the northern boundary line of the State of Missouri agreed upon by said Company, and a company authorized on the part of the State of Iowa to construct a railroad to intersect the road authorized to be constructed by the provisions of this act, at the most practicable point on said State line."

The printed record (p. 197) shows that it was, among

other facts, confessed in case of Wagner *vs.* Metz that the Alexandria and Bloomfield Railroad Company was duly organized A. D. 1864, and existed under that title until Feb'y 19, 1866, when the Legislature of Missouri passed an amendment to said charter, sec. 1 of which authorized a change of name to the Alexandria and Nebraska City Railroad Company.

In said suit of Wagner *vs.* Metz, and in Thomas *vs.* Scotland County, (94 U. S.,) the record shows that only said first section of said law was accepted by the Alexandria & Bloomfield R.R. Co.; but the printed record of this Court, in the case of Schuyler County *vs.* Thomas, Oct. 7, 1878, shows that therein it was agreed that the following additional sections of said law (laws of Mo., 1866, 222,) were accepted:

SEC. 2. That said railroad company may extend said road from a point at or near Luray, in Clark county, to Nebraska City, in Nebraska Territory, on the most practicable and direct route by way of or near Rockport, in Atchison county, Missouri.

This manifestly was the section referred to in the opinion of Mr. Justice Hunt, (98 U. S., 174:) "It was contended that, having fixed the route by *way of Upton*, (the first location,) the power was exhausted. *Without considering that general proposition*, we are of the opinion that it does not govern the present case. The legislature did amend the charter so as to authorize a location extending entirely through Schuyler county."

Section 3 of said law of 1866 authorized consolidation with other roads, and section 4 provided that the whole of this act or any section thereof, duly adopted by the Alexandria & Bloomfield Railroad Company, shall be in force after such adoption.

The maps in printed record of Schuyler County *vs.* Thomas, Oct. 5, 1878, and the admissions made in the case

of Wagner *vs.* Metz, show that there were very different facts in these cases, from those considered in the opinion delivered by Mr. Justice Bradley. (Thomas *vs.* Scotland County, 94 U. S., 691.) All that Schuyler *vs.* Thomas settled was that upon the record before this Court there was power to change the route. The issues presented by record in Wagner *vs.* Metz (printed record, 197–215,) were that there was no power to issue bonds to the consolidated Company without an election, and that there was no power to make the change contemplated under sections of law of 1866 which had not been made operative; that there was a ruinous general change of route after great sums had been expended upon a different line, agreed upon by the consolidated companies, and that even if there was power to make the change, it had not been done in conformity to law set forth at page 3 of our reply to supplemental brief of defendant in error.

The general statutes of Missouri, 1879, page 502, section 3462, declare "that every action shall be prosecuted in the name of the real party in interest," and is relied upon by plaintiff in error to support the third assignment of error, and as effecting not only the interest in this suit of Thomas B. Hill, of Missouri, but also that of the National Bank of Warsaw and others, citizens of other States than Missouri.

The necessity for referring to so vast a number of statute laws makes it improbable that I will have time to discuss orally all the assignments of error. I therefore beg leave to submit here a few words concerning the 8th assignment of error. (Original brief, p. 21.) The Court manifestly erred in applying either of these three answers to the first count of plaintiff's petition, which had been separately answered. The second plea of the second amended answer (p. 165 printed record) consists of flat denials, and is a copy of the

first plea. The fourth plea, like the second, names only the Missouri, Iowa, and Nebraska Railway Company, and states a proposed subscription to said company without reciting the existence of the Alexandria and Bloomfield Railway the acceptance by said company of the act changing its name to the Alexandria and Nebraska City Railroad Company on the consolidation with the Iowa Southern Railway Co., under the name of the Missouri, Iowa and Nebraska Railway Co. All these facts should have been pleaded in chief by plaintiff; they were not pleaded; they were not admitted by defendant. This plea does not set forth any form of bond, but alleges there that one Dawson and the clerk of the court signed them in vacation, and placed them in the hands of Charles Metz, trustee for Scotland county, about the 1st of September, 1871; that before they left his hands or had passed into circulation an injunction suit against all the proper parties was filed and in due course of time made perpetual by the supreme court of Missouri and cancellation of bonds ordered, with full actual notice to plaintiff and every preceding holder, none of whom paid value.

The third plea does not set out the same form of bond afterwards offered on trial. It shows that said bond was made during vacation by one of the three justices of the court and the clerk. It did not recite that it was issued in pursuance of any order of a county court, or in payment of stock or under the authority of the act incorporating the Alexandria and Bloomfield Railroad Company. It simply names the *payee* as a corporation formed under the laws of the States of Missouri and Iowa by the consolidation of the Alexandria and Nebraska Railroad Company, formerly Alexandria and Bloomfield Railroad Company and the Iowa Southern Railway Company.

The answer avers that no subscription of stock was ever

made by the county and that though the proposed subscription of said Dawson and former justices of the county court had never been accepted, or the conditions or terms thereof complied with, said Mety did about the 25th of September, 1871, and the 11th of December, 1871, without other authority than as recited, deliver said bonds to the Treasurer of the Missouri, Iowa, and Nebraska Railway Company, in exchange for utterly worthless certificates or shares of stock purporting to have been issued by said company to defendant, and that no election to obtain assent of tax-payers or qualified voters was held. This bond (p. 166) neither purported to be issued by order of Court, or in payment of stock (a recital absolutely essential) or under authority either of any general or special laws (another recital absolutely essential.) If, under special charter, the act should be named; if, under general law, this condition precedent of an election should be recited, actual notice was alleged in each plea. (Steines *vs.* Franklin County, 48 Mo., R., 169. March, 1871.)

It may be that the court below confounded the 2d, 3d, and 4th pleas with the pleadings contained in record of Wagner *vs.* Metz, which admitted the consolidation, &c., was excluded on the trial of this case, and has elsewhere been fully discussed. Certainly neither of the three pleas confessed the authority for the execution of all the coupons sued on.

HENRY A. CUNNINGHAM,
Attorney for Plaintiff in Error.

12-183

OCT 14 1884

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

THE COUNTY OF SCOTLAND,
Plaintiff in Error,

vs.

WILLIAM HILL,
Defendant in Error.

STATEMENT AND ARGUMENT OF DEFENDANT IN ERROR.

A. J. BAKER AND F. T. HUGHES,
Attorneys for Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

THE COUNTY OF SCOTLAND,
Plaintiff in Error,
vs.
WILLIAM HILL,
Defendant in Error.

STATEMENT OF DEFENDANT IN ERROR.

This was a suit brought in the Circuit Court of the United States to recover on certain interest coupons detached from bonds of the plaintiff in error, issued in payment of subscription of stock by said county in its corporate capacity, to the Missouri, Iowa and Nebraska Railway Company. The bonds were in the words and figures following, except that each bond had a separate number.

"$1,000. UNITED STATES OF AMERICA. No. 5.

"EIGHT PER CENT. RAILROAD BOND.

"County of Scotland.] [Twenty-five years.

"Know all men by these presents, that the county of Scotland, in the state of Missouri, acknowledges itself indebted to the Missouri, Iowa and Nebraska Railway Company, a corporation existing under and by virtue of the laws of the states of Missouri and Iowa, formed by consolidation of the Alexandria and Nebraska City Railroad Company (formerly Alexandria and Bloomfield Railroad

Company) of the State of Missouri, and the Iowa Southern Railway Company of the state of Iowa, in the sum of $1,000, which sum the said county hereby promises to pay to the said Missouri, Iowa and Nebraska Railway Company, or bearer, at the Farmers' Loan and Trust Company in New York, on the thirty-first day of December, A. D. 1895, together with interest thereon from the thirty-first day of December, 1870, at the rate of eight per cent. per annum, which interest shall be payable annually, in the city of New York, on the thirty-first day of December in each year, as the same shall become due, on the presentation of the coupons hereto annexed. This bond being issued under and pursuant to an order of the county court of said Scotland county, for subscription to the stock of the Missouri, Iowa and Nebraska Railway Company, as authorized by an act of the general assembly of the state of Missouri, entitled "An Act to incorporate the Alexandria and Bloomfield Railroad Company," approved February 9, 1857.

"In testimony whereof, the said county of Scotland has executed this bond by the presiding justice of the county court of said county, under the order of said court, signing his name hereto, and the clerk of said court, under the order thereof, attesting the same, and affixing thereto the seal of said court. This done at the town of Memphis, in the county of Scotland, in the state of Missouri, this first day of September, A. D. 1870.

"WILLIAM DAWSON,
"Presiding Justice of the County Court of Scotland County, Mo.

"Attest:

Scotland County Court, Missouri, Seal.

"STERLING McDONALD,
"Clerk of the County Court of Scotland County, Mo."

There were two hundred of these bonds, and to each of them there were attached 25 interest coupons of $80 each. This suit was to recover on divers of these coupons, running from the 3d to 7th maturing coupons. The act of the general assembly referred to in the bond as "An act to incorporate the Alexandria and Bloomfield railroad company," approved February 9, 1857, is a general law of the state of Missouri, found on page 94 of the acts of the General Assembly for the year 1857.

The tenth section of this act provides as follows:

"Sec. 10.—Said company shall in all things be subject to the same restrictions, and entitled to all the privileges, rights and immunities which were granted to the North Missouri Railroad Company by an act entitled 'An Act to incorporate the North Missouri Railroad Company,' approved March 3, 1851, so far as the same are applicable to the company hereby created, as fully and completely as if the same were herein re-enacted."

Section fourteen of the "act to incorporate the North Missouri Railroad Company" is found on page 486 and 487 of the acts of the General Assembly of Missouri for the year 1851, and is as follows:

"Sec. 14.—It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company, and it may invest its funds in the stock of said company and issue the bonds of said county to raise funds to pay the stock thus subscribed." * * *

The petition was in the usual form of petitions in such cases.

To this petition the plaintiff in error answered by four pleas.

The first and second answer denies generally the averments of the petition.

The third plea or count of answer admits the execution of the bonds and the subscription to the stock of the company by an order of record of the county court of Scotland county, and gives the form of the bond issued, as heretofore set out. That said bonds were delivered to Charles Meety, as trustee of Scotland county, and that said Meety delivered the bonds to the railway company in exchange for certificates or shares of stock. But the answer avers that the acts of the court and the clerk and said Meety were all illegal and void, for reasons which may be briefly summarized as follows:

1.—Because no part of the Missouri, Iowa and Ne-

braska Railway, AT THE RESPECTIVE DATES OF SAID ORDERS OR ACTS were within Scotland county.

2.—Because the county court of Scotland county at no time caused an election to be held to decide whether or not the subscription should be made.

3.—Because, in fact, no such election was ever held, nor did any of the voters ever vote upon such question.

4.—Because the county court of said county never ordered such an election to be held.

There are the further averments in this count that the plaintiff (defendant in error) received the coupons after they were detached from the bonds, and that nothing of value was given for them.

The fourth plea or count of the answer contains substantially the same admissions as to the issue of the bonds, etc., as does the third count, and then pleads that prior to the delivery of said bonds the said Charles Meety was enjoined from delivering them, and that the defendant in error and his prior holders had notice of such injunction before they purchased the coupons in suit.

This suit of Wagner et al, vs. Meety et al, asked to enjoin the issuance of said bonds, and that they be called in and canceled, for the reasons stated in this third plea of the plaintiff in error in this suit.

The record in Wagner vs. Meety discloses the fact that at the time the petition therein was drawn, the M., I. & N. R'y was completed to within two miles of Memphis, the county seat of Scotland county, and that the same was being rapidly worked and a depot in process of erection at said county seat.

To this answer the defendant in error filed a reply on the first day of December, 1879, denying the allegations of the answer and pleading his rights under the charter of the railroad company.

On the 27th of January, 1880, defendant in error had leave to withdraw his reply and to demur to the answer

of plaintiff in error on or before the 28th of January, 1880.

The reply does not seem to have been withdrawn nor any demurrer filed, and on the 9th of March following the plaintiff in error moved for judgment on the pleadings. The motion was overruled and the court vacated the order granting leave to withdraw the reply, and set the cause for trial on April 22, 1880, upon the pleadings as they were before said leave to withdraw was granted. See page 128.

To this the plaintiff in error excepted, and this ruling of the court is the ground of his first bill of exceptions.

On the 22d day of April following, the case was tried by the court without the intervention of a jury, and a judgment had for $53,951.24. See page 183.

The plaintiff in error appeared and defended in said trial by its attorney, H. Cunningham.

A motion for new trial and in arrest was made. (Pages 183, 184). One ground of the motion in arrest was that there were coupons included in the suit and judgment that had matured since suit was brought. Pending these motions for new trial and in arrest, the defendant in error entered a remititur for the amount of these coupons and took judgment for the balance left, being $45,491. (Page 185).

The motions for a new trial and in arrest were overruled, and the plaintiff in error filed his second bill of exceptions. (Page 186.)

At the writing of this statement the plaintiff in error has not made his assignment of errors.

The defendant in error has to rely upon the objections stated in his motions for new trial and in arrest.

The grounds for new trial are as follows:

1.—The court erred in admitting, contrary to defendant's objections, illegal evidence offered by plaintiff, on trial of this cause.

2.—The court erred in excluding competent and legal evidence offered by defendant upon the trial of this cause.

3.—The court erred in finding and declaring, as an issue of law upon the trial of this cause, that the issues tendered by the defendant in third count of its second amended answer to plaintiff's amended and consolidated petition were taken as RES ADJUDICATA, without hearing evidence thereon.

4.—The court erred in finding and declaring as an issue of law upon the trial of this cause, that the execution of the instruments of writing in plaintiff's amended and consolidated petition declared upon, was confessed by defendant's second amended answer to plaintiff's amended and consolidated petition.

5.—The court erred in finding and declaring as an issue of law upon the trial, that the execution of the bond numbered 5, offered in evidence by plaintiff, contrary to defendant's objections, was confessed by defendant's second amended answer to plaintiff's amended and consolidated petition.

6.—The court erred in finding and declaring as an issue of law, upon the trial of this cause, that there were no issues of fact presented upon which the court, sitting as a jury, could make a special finding of facts, and therefore refusing to make such special finding of facts, as requested by defendant.

7.—The verdict of the court as a jury was unsupported by and contrary to the evidence.

8.—The verdict of the court was contrary to law.

All there is in addition to these is in the 2d clause of the motion in arrest, viz:

"Plaintiff's amended and consolidated petition does not state facts sufficient to constitute a cause of action against this defendant."

The evidence offered by the defendant in error upon trial and objected to by the plaintiff in error was the following, viz: p. 188.

Defendant in error offered in evidence 468 coupons upon which suit was founded and which, excepting the number of the coupon and date of maturity, were as follows:

$80. MEMPHIS, MO., SEPT., 1ST, 1870. 8 per cent.

The County of Scotland, State of Missouri, will pay to the bearer, on December 31st, 1873, at the Farmers Loan and Trust Company in New York, eighty dollars, being one year's interest on bond No. 5, for $1,000.

S. MCDONALD, County Clerk.

Three objections or causes for objection were interposed to the admission of these coupons in evidence:

1. Want of proof of execution.

2. There was no revenue stamp on the coupons.

3. It had not been shown that the coupon was issued by the County in exercise of its authority.

Similar objections were made to the bond offered in evidence page 189.

The bill of exceptions then states in a general way that the defendant offered to prove,

1. That the plaintiff was not the owner of the coupons in suit.

2. That no election was ordered to be held.

3. Offered to prove the fourth count of its answer setting up injunction of Levi J. Wagner, et al, vs. Meety, et al.

4. Offered to prove that plaintiff and those under whom he claims had notice of the pendency of that suit.

The record by which plaintiff in error offered to prove the fourth count is set out in full in bill of exceptions (commencing on page 190).

The plaintiff in error then offered in evidence the deposition of William Hill. The deposition is set out in full in bill of exceptions (commening on page 215).

Defendant in error objected to the evidence in the deposition because the bonds were delivered to the railroad company before any injunction was issued.

2. That the issuing of the bonds was a legal act of the county, and good in anybody's hands.

The bill of exceptions goes on to state further that plaintiff in error offered to prove by parol that Henry Hill owned some of the coupons and had notice of the injunction suit.

That the M. I. & N. R'y Co. had actual notice of the pendency of the suit. That the Iowa Construction Co. had received the coupons from the M. I. & N. R'y Co. with notice of said suit.

That Henry Hill, C. H. Mellen, James B. Dodge, Zeno Lecor, Wm. H. Gebhardt, H. B. Stone, Thos. B. Hill and James Tobey received the instruments from the Iowa Construction Company with notice of the injunction suit.

Plaintiff in error then offered in evidence a bond made by Henry Hill and F. M. Drake to Chas. Meety, which bond is set out in full in the bill of exceptions on page 223.

Then offered to prove orally that Wm. Hill and each preceding holder received the instruments sued on with actual notice of the pendency of the suit of Wagner vs. Meety.

To prove orally that Chas. Meety had actual notice of said suit at the time he delivered the bonds to the railroad company.

The defendant (plaintiff in error) then requested the court to make special findings without designating the questions upon which he desired the court to find specially.

ARGUMENT.

I.

The first bill of exceptions of the plaintiff in error is to the effect that the court erred in overruling his motion for judgment upon the pleadings. (See pages 181 and 182, record).

The defendant in error had asked leave to withdraw his reply with a view to demur to the answer.

This leave was granted but the reply was not withdrawn nor was the demurrer filed. Other proceedings were had and the case passed along from January 27, 1880, to March 9, 1880, when plaintiff in error filed his motion.

Under the liberal rules of practice in Missouri the court had the right to overrule the motion and make the order it did that the pleadings stand as they were before the leave to withdraw was granted. This court will not interfere with the exercise of a sound discretion in a matter like this on part of the trial court unless an abuse of the discretion is shown. Nothing of the kind is done in this instance. The only error assigned is the simple overruling of the motion. The plaintiff in error afterward appear and had all the benefits of a fair trial and of all exceptions asked by him on trial, and there is nothing to show that he was in any manner taken by surprise or in any way wronged by reason of the former ruling of the court.

"The provisions of the statute in relation to the time of filing pleadings are principally directory, the object being to have the issues prepared for trial as soon as possible. By the courtesy of attorneys and counsel great liberality is exercised in allowing time, etc." Whittlesey, Mo., pr. 285.

II.

This action, as said in the statement, is founded upon coupons, detached from the bonds of Scotland County,

issued to the Missouri, Iowa and Nebraska Railway Company, in payment of stock subscribed by the county.

The bond recites the authority for the subscription as follows:

1. The county acknowledges itself indebted to the Missouri, Iowa and Nebraska Railway Company, a corporation existing under and by virtue of the laws of the States of Missouri and Iowa, formed by consolidation of the Alexandria and Nebraska City Railway Company (formerly the Alexandria and Bloomfield Railroad Company, of the State of Missouri, and the Iowa Southern Railway Company of the State of Iowa. * * *

This bond being issued under and pursuant to an order of the county court of said Scotland county, for subscription to the stock of the Missouri, Iowa and Nebraska Railway Company as authorized by an act of the general assembly of the state of Missouri, entitled, 'An Act to Incorporate the Alexandria and Bloomfield Railroad Company' approved Feb. 9, 1857.

This act so referred to in the bond is found on page 94, acts of general assembly of Missouri for 1857, Sec. 10, is as follows:

"The said company shall in all things be subject to the same restrictions, and entitled to all the privileges, rights and immunities which were granted to the North Missouri Railroad Company by an act entitled 'An Act to incorporate the North Misssouri Railroad Company,' approved March 3, 1851, so far as the same are applicable to the company hereby created, as fully and completely as if the same were herein re-enacted."

The 14th section of the act of March 3, 1851, is found on page 486 of the acts of the General Assembly of Missouri for the year 1851, and is as follows:

"It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company * * and issue

the bonds of such county to raise funds to pay the stock thus subscribed," etc.

We claim that the answer of the plaintiff in error fully admits the fact that the county court of Scotland county made a subscription of two hundred thousand dollars to the stock of the said M., I. & N. R'y Co., and issued its bonds in payment therefor, and that such bonds were by its agent, Charles Meety, delivered to the railway company in exchange for certificates of stock of said corporation.

Having thus admitted the subscription of stock, the issue and delivery of the bonds, and the receipt of the certificates of stock, the plaintiff in error seeks to avoid payment of the interest sued on.

1.—Because no part of the railroad was in Scotland county.

2.—Because the question of subscribing stock and issuing bonds in question was not submitted to a vote of the qualified voters, etc.

3.—Because at the time the defendant in error purchased his coupons in suit, there was a suit pending in the state courts of Missouri, asking that the delivery of said bonds by said Meety, agent, be enjoined, and that the bonds be canceled, etc., and charging that the defendant in error and all those under whom he claims, had notice of the pendency of said suit.

We will examine each of these objections in their order.

1.—The fact of whether or not the road was actually in the county at the time the subscription was made, would make no difference. If the route of the road was in the county, as designated in the charter, and was afterward actually built there. That it was, is not denied in the pleadings, nor does the plaintiff in error attempt to prove the allegation of the answer that the road was not actually in the county when the subscription was made and the bonds issued. He seems to have abandoned the proposed defense as useless.

2.—No vote was required to authorize the county court to make the subscription it did. That such is the law has been thoroughly settled by this court in the cases of Scotland County vs. Thomas, 94 U. S. Rep., 682, and in Schuyler County vs. Thomas, 98 U. S. Rep., 169, and by the Supreme Court of the State of Missouri in the case of Smith & Hall vs. Clark County, 54 Mo., 58.

In the last case the subscription had been made by the county court of Clark county to the Alexandria and Bloomfield Railroad Company, under the powers granted by the same charter invoked in the bond sued on. And in the case of Scotland County vs. Thomas, the same series of bonds and the same powers as relied upon in this case were involved, and the same defenses were made as are made in this case, except as to the pendency of the injunction suit.

In the case of Schuyler County vs. Thomas, the subscription was made by the county court of Schuyler county to this same railroad company, invoking the powers contained in the same charter, and the same defense of no vote was made, and in each of said causes the bonds were held valid securities, and that the power had been properly exercised in the subscription of stock and issue of bonds, by their respective courts, without a vote.

The controversy on these points has been effectually closed in this court in the recent case of the County of Greene vs. Comness, 103 U. S., p. 104.

3.—The 4th count of the answer constitutes no defense to the claim of defendant in error.

The plaintiff in error has in the record inserted in full all the pleadings in the injunction suit of Wagner et al. vs. Meety et al. and the causes therein stated wherefore the court is asked to enjoin the delivery of the bonds, and to declare them null and void, are in effect the same as the defenses urged in this court against recovery in the cases of Scotland County vs. Thomas, and Schuyler County vs. Thomas.

The petition in Wagner vs. Meety avers the charter of the Alexandria and Bloomfield Railroad Company, under act of February 9, 1857, and also avers that under said act the incorporators named therein organized and accepted the charter within the time limited in the act.

It avers the passage of the act of February 19, 1866, authorizing the corporation to change its name from the Alexandria and Bloomfied to the Alexandria and Nebraska City Railroad Company, and the acceptance of the provisions of the act, and the change of name.

It avers that the company thus organized and chartered, located a line of railroad from Alexandria, in Clarke County, Missouri, to Luray, in said county, and thence in a northwesterly direction up the divide between the waters of the Wyaconda and Little Fox, across the northeast corner of Scotland county, to a point on the state line between Missouri and Iowa, some ten miles east of the northeast corner of Scotland county.

It avers the existence of the Iowa Southern Railway Company in Iowa, and the consolidation of said railway company with the Alexandria and Nebraska City Railroad Company, whereby the Missouri, Iowa and Nebraska Railway Company was formed.

It avers that by the terms of the consolidation the proposed route was the one surveyed and partially graded, via. Luray and up the divide across the northeast corner of Scotland county.

It then avers that Dawson, Cooper and Marquis were the Justices of the County Court of Scotland County, and as such, upon the presentation to them of a petition signed by 1365 of the resident taxpayers of said county, they caused an order to be entered of record, subscribing $200,000 stock to the said Missouri, Iowa and Nebraska Railway Company, upon condition that the LOCATION OF SAID RAILROAD BE SO CHANGED AS TO RUN WITHIN ONE-HALF MILE OF THE TOWN OF MEMPHIS, in said county.

It then avers that the route was so changed and the railroad so located. That the agent of the county subscribed the stock upon the books of railroad company, and that the bonds were executed and signed by the presiding justice and clerk of the county court, and sealed with the corporate seal of Scotland county, and were delivered to Chas. Meety, as trustee or agent for the county, to hold the same until the conditions were complied with, and upon such compliance, to deliver the bonds to the railway company.

It avers that by the terms of the subscription one-half of the bonds, $100,000, were to be delivered to the railway company when the road should be completed and the cars running to a depot WITHIN ONE-HALF MILE OF THE COURT HOUSE IN THE TOWN OF MEMPHIS, in the said county, and the balance when the road should be completed and the cars running to either the north line or the west line of Scotland county, as the railway company might thereafter decide to locate and construct it.

It avers a compliance with the terms of the contract in so far as the first $100,000 of bonds were concerned.

That at the time the original petition was filed the road was constructed and cars running within two miles of a depot one-half mile from the court house in Memphis, and that at the time of the filing of the amended petition the road was completed and cars running to said depot.

It avers that said subscription was illegal, unauthorized and void, and that the bonds were illegal and void.

1.—Because the M. I. & N. R'y Co. had abandoned the line of their railroad as first located and partially graded, and had relocated and built the same on the line described in the terms of subscription, via. the town of Memphis, via. Lancaster in Schuyler county, and was building it on a line through Schuyler county.

2.—That the bonds were illegal because there had been no election, and because two-thirds of the qualified

voters of the county had not voted in favor of the subscription of stock.

3.—That the road had been located west from Memphis, via. Lancaster in Schuyler county, Mo., without warrant of law.

4.—That the line as so located is a change of the general route as agreed upon in the articles of consolidation and charter of the railroad company.

These were all the grounds alleged in the petition asking for an injunction as constituting the illegality of the bonds.

Before the Supreme Court of Missouri had passed upon the questions thus presented to it, this court had decided every question thus raised both in the cases of Scotland County vs. Thomas and Schuyler County vs. Thomas.

We have already referred to the decision of the court in relation to the right of the county court to subscribe and issue its bonds as it did without a vote.

The remaining question as raised by the petition in Wagner vs. Meety, was that the line of the road had been so materially changed as to render the subscription invalid and the bonds illegal.

Referring to the same question when raised in this court in the case of SCOTLAND COUNTY vs. THOMAS, at page 691, of 94 U. S. Rep., his honor, Mr. Justice Bradley, says, "The general direction of the road is not changed. It does not pass through Bloomfield, it is true; but it does not pass it by so far as to be a substantial departure from the route originally indicated."

This effect of a change of route is more fully discussed in the case of SCHUYLER COUNTY vs. THOMAS, 98 U. S., at pages 171, 172 and 173. This the court will remember is in relation to a subscription by Schuyler county, Mo., to this same corporation and in the same way without a precedent vote.

Schuyler county lies immediately west of Scotland,

and of course is still further off from a direct line from Alexandria to Bloomfield.

Referring to this, Mr. Justice Hunt delivering the opinion of the court says:

"Bloomfield, as we learn from the maps in evidence, lies in a northwesterly direction from Alexandria. Schuyler county is also in a direction from Alexandria, northwesterly as to a portion of it, and more nearly northerly as to another portion of it. * * * These maps and the geography of the state inform us that this road could be so located as to reach the immediate vicinity of Bloomfield with but little variation from a direct line through Luray and Upton, WHICH WAS FIRST ADOPTED."

Further the court will see by reference to the second grounds for denying the legality of the bonds in SCHUYLER COUNTY vs. THOMAS, and on page 172, that this exact question of a change of route was relied upon, and that it is fully met and answered by Mr. Justice Hunt in the opinion in said cause (on page 174).

These were the only points raised by the pleadings in the case of Wagner vs. Meety, and the court will see upon examining the decision of the Supreme Court of Missouri, (see 69 Mo., 150) that the court entirely mistook the issue raised.

The petition distinctly states that the CONTRACT of subscription required that the route of the road as originally located, via. Upton, should be changed so as to run by Memphis, and that it is averred that the change was so made, and that in compliance with the terms of the contract the road was built by Memphis.

The Supreme Court of Missouri, or at least the judge delivering the opinion, could not have read the pleadings with any care, for he falls into the error that after the subscription was made the route was changed to one other than the route designated in the order or contract of subscription. They failed entirely to comprehend the

case made by the record, viz: that the bonds were illegal because the route was changed so as to comply with the contract of subscription; whereas, the court bases its opinion upon the supposition that the route was so altered as to run in a direction different from that named in the order for subscription.

This is so radical a mistake as to destroy the authority of that case upon this question of change, and leaves only the other question that the bonds were void because they were issued without a vote.

The Supreme Court of Missouri had, before the time this court decided the cases of Scotland County and Schuyler County vs. Thomas, held in a series of well-considered cases, that the constitution of 1865 did not interfere to render invalid subscriptions of stock to railroads without a vote, where the charter passed prior to 1865 gave the right so to do.

R. R. Co. vs. Marion County, 36 Mo., 294-304.
State vs. Sullivan County, 51 Mo., 522.
State vs. Macon County, 41 Mo., 453.
City of St. Louis vs. Alexander County, 23 Mo., 483.
Smith vs. Clark County, 54 Mo., 58.
State vs. Green County, 54 Mo., 540.

In the case of Wagner vs. Meety, however, they base their decision upon the fact of the consolidation of the Alexandria and Nebraska City R'y with the Iowa Southern R'y Co., whereby the Missouri, Iowa and Nebraska was formed.

In the case of State ex rel. vs. Green County, supra, however, the court had decided that the consolidation did not invalidate the subscription, and this court had followed that decision in the cases of Scotland County vs. Thomas, and Schuyler County vs. Thomas.

This had been the settled doctrine of this court before Phil. and Wil. R'y vs. Maryland, 10 How. 376; Tomlinson vs. Branch, 15 Wal., 460; and it has been followed and adhered to by this court in numerous cases since.

County of Henry vs. Nichokay, 95 U. S., 619.
County of Cass vs. Gillett, 100 U. S., 585.
Louisiana (city) vs. Taylor, 105 U. S., 454.
County of Ralls vs. Douglas, 105 U. S., 728.
Green County vs. Conness, 109 U. S., 104.

In the last case the court, referring to its language in County of Ralls vs. Douglas, says "from the views thus expressed we are not disposed to swerve."

Such being the case we ask what difference did it make if the defendant in error did know of the pendency of the suit of Wagner vs. Meety, when he purchased his bonds. They were merchantable, negotiable securities belonging to the domain of general jurisprudence, not subject to the special jurisprudence of Missouri. The purchaser being a citizen of another state, his tribunal is that of the United States Courts, and he was justified in relying upon the law as expounded by this, the highest tribunal in which his remedy was to be adjudicated. He had a right to infer that the courts of Missouri would conform their decisions to the decisions of this court, or failing to do so, that this court would not depart from the law as it had expounded it, to rob him of his property.

Had the defenses been pleaded in this court that were set up in Wagner vs. Meety, they had been held insufficient. They were the defenses that were pleaded in the case at bar in the trial court, so that the only question presented is, will this court now "swerve" from the doctrine it has established in these cases, to conform its decisions to the later cases in Missouri. It has said in Ralls County vs. Douglas, and Green County vs. Conness, that it would not.

The fact that a suit in equity was pending of which the defendant in error might have had notice, does not alter the case at all, for in the language of the learned justice delivering the opinion of this court in Carroll County vs. Smith, 111 U. S., at page 562: "If he had, that notice would have been merely of the question of law, of which, as we have seen, he is bound to take

notice, at all events, and which is now for adjudication in this case." He took the risk of this court deciding that the matters pleaded in that case would be a valid defense to a suit for recovery on the bonds. This is made perfectly clear by the learned justice further on in the case cited, where on page 563 he says:

"When, therefore, it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the state by which his rights are fixed and governed. It was to that end that the Constitution of the United States granted to citizens of one state, sueing in another, the choice of resorting to a federal tribunal."

We therefore say that if it were true, as the plaintiff in error insists, that the defendant in error, and those under whom he claims, had notice of the pendency of the suit of Wagner vs. Meety, it would be no defense in this case, because this court has repeatedly held that the matters relied on by the plaintiff in that case constitute no defense to a suit to recover the interest on these bonds.

If it were necessary we could confidently assert that no evidence was introduced or offered by the defendant at the trial below which tended to prove that plaintiff, or those under whom he holds, had actual notice of any defects or irregularities in the issuance and delivery of the bonds and coupons in suit, so as to effect such securities in his hands.

The only evidence properly offered was the deposition of William Hill, defendant in error, which, if it had been read, fully establishes the converse of the proposition.

The other matters excluded were mere "offers to prove," made by counsel in the following form: (Page 223). "Defendant then offered to prove, orally, that

William Hill, the plaintiff, and each and every preceding holder thereof, received the instruments sued on with actual notice of the pendency of the aforesaid suit of Levi J. Wagner et al, vs. Meety et al.

It is said this was error in the court in excluding such offers. No witnesses were tendered nor offered to be examined, nor is it shown any such witnesses were in court. It was counsel's duty to have called witnesses upon the stand and propounded appropriate questions for the purpose of eliciting such proof, and then upon objection made and sustained by the court, and an exception taken, the question would have been presented for review in this court, and it would have been a REAL AND SUBSTANTIAL question in the cause.

He could not make an offer of proof which he had no witness to sustain, and insist upon the court deciding the question which that offer raised, for that would be invoking from the court below and from this court a decision upon a mere MOOT QUESTION.

If such a practice were allowed it would be quite possible for a party without having any witness at all to the point, to raise any controverted or difficult question as to the admissability of evidence which the cause on trial admitted of, and obtain a reversal of the judgment against him if the court below should in the opinion of this court have ruled erroneously on such question.

The witnesses should be produced that the court may judge their competency as witnesses at all. They may be NON COMPOS MENTUS or unable to comprehend the obligations of an oath or may be excluded upon statutory grounds.

These propositions are reasonable and have been directly passed upon in Robinson vs. State, 1 Lea, (Tenn.), 673, and Eschback vs. Hurt, 47 Md., 66. Where the law is laid down almost in the words we have expressed.

From these views it is perfectly clear that the testimony offered by defendant was not sufficient, if other-

wise competent, to warrant the court in finding plaintiff had actual notice of the pendency of the injunction suit of Meety vs. Wagner, and the court was therefore right in excluding all of it. Commissioners vs. Clark, 94 U. S., 288.

When plaintiff had produced and offered the bonds and coupons in evidence, he had then made out his case in every respect. Besides the other admissions and proofs, the bond was sufficient to prove every fact necessary to a recovery. It recites the charter of the A. & B. Company by its title and date of approval, the change of name and consolidation with the Iowa Company. These were all necessary and jurisdictional facts to be determined by the county court before it could lawfully subscribe to the M., I. & N. Company under the A. & B. charter. Having determined these facts and recited them in the bond, the county is conclusively bound by them.

Marcy vs. Township of Oswego, 92 U. S., 637.
Sherman County vs. Simons, 109 U. S., 735.
Carroll County vs. Smith, 111 U. S., supra.

With the utmost confidence in the judgment of the court below, the cause is

Respectfully submitted.

A. J. BAKER, and
F. T. HUGHES,
For Defendant in Error.

112-183

Supreme Court of the United States.

OCTOBER TERM, 1884.

THE COUNTY OF SCOTLAND,
Plaintiff in Error,
vs.
WILLIAM HILL,
Defendant in Error.
} No. 32.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

Having now seen the brief and statement of plaintiff in Error, we shall answer some of the propositions.

As to the special charter powers authorizing the county to subscribe to the A. & B. Company without a precedent vote, it is sufficient to say that the Supreme Court of Missouri, in Smith *vs.* Clark County, 54 Mo., 62, held that no such vote was necessary, and as we have shown, this court held the same in the case of Thomas *vs.* Scotland County, 94 U. S.

But aside from that the Supreme Court of Missouri has expressly decided that the charter of the A. & B. Company is not subject to alteration and amendment under the general laws of 1855 and 1865, as claimed by counsel for plaintiff in Error.

This the court held in a suit by plaintiff in error *vs.* the M., I. & N. Railroad for taxes, in which it was claimed that

an exemption from taxation in the A. & B. charter had been repealed under this general power, but the court held it had not, nor could it be, as the reservation did not apply to this charter.

Scotland County *vs.* M., I. & N., 65 Mo., 136.

Plaintiff in Error at page 36 of his brief admits the bond and rate of interest would be proper if the A. & B. charter was not subject to amendment.

There was no proof in the record of the injunction suit of Wagner *et al. vs.* Meety *et al.*, showing that a temporary injunction was granted by the judge of the Scotland County Circuit Court about the 21st of September, 1871, as claimed by counsel.

At page 209 and 210 of the printed record appears a paper signed by E. V. Wilson, judge 4th Judicial Circuit, purporting to be an agreement of counsel to defer the hearing of the application for a temporary injunction until the next term of Scotland Court, which was held in October following, at which time the application "should be either granted or refused." This paper the court will see is no part of the record of the Scotland Court as certified by Chas. Martin, clerk, and does not show that it was ever filed in the Scotland Court; but the clerk of the Shelby County Court states the paper was filed in his office June 4th, 1873. He does not say by whom or by what authority.

The facts are the case was heard at the October term of the Scotland Court, and the temporary injunction refused by Judge Wilson; and the complainants went to the Supreme Court of Missouri stating such refusal and obtained and alternative writ of mandamus upon the judge to show cause why he thus refused, and that court on final hearing dismissed the writ.

See State *ex rel.* Sparks *et al. vs.* Wilson, judge 4th Judicial Circuit, 49 Mo., 146.

When this decision is read in connection with the record offered it renders plain what might otherwise seem doubt-

ful. It also explains why Forester & Searight, page 195, were asking the Scotland Court at the same October term to release them from an injunction bond which they were unwilling should be used to enjoin the bonds in question and might offer an explanation for a change of venue prayed against this same judge by the complainants in the bill.

We have shown that the special charter powers authorizing the subscription were properly pleaded in the petition and reply, and fully admitted in the 3d and 4th pleas of the answer; that in addition to these admissions, the bond was introduced showing on its face all these facts.

The 4th plea further avers the injunction suit of Wagner *vs.* Meety, and set up that the county issued these bonds and placed them in the hands of a trustee to be delivered, and then goes on to show that these same bonds were ordered to be delivered up and canceled by the State court.

Then in the tax case of Scotland County *vs.* M., I. & N., 65 Mo., *supra*, the county avers the existence of the A. & B. Company, change of name and consolidation with the Iowa road, and again confessing all these facts by the demur in the Thomas case in this court, it would seem that the question was settled.

The Defendant in Error had leave to fill additional coupons up to February 1, 1879, by order of court, made on consent of parties, page 145, printed record, and on page 155, by further consent, order made April 22, 1879, no advantage could be taken by reason of other parties than plaintiff claiming to be owners of some of the coupons sued on.

It is said there was no proof of the execution of bond five offered in evidence, and was therefore improperly received aside from the fact that the pleadings admit the execution. *The bond proves itself on inspection.* The county courts of Missouri are courts of record having a seal. The bonds are under seal of the court, attested by the *clerk of the county court* of Scotland County, Missouri, *under order of the court.*

The United States courts sitting in Missouri take judicial notice of the seals of the courts of that State, and this they will do without requiring any proof of its genuineness or identity other than that afforded by inspection thereof. And, further, it is presumed that the person who affixed the seal had competent authority to do so.

The law assumes that the public seals of the State are known to all its judicial officers, nor, in view of the heavy penalties imposed on the falsification and forgery of such seals, will it be supposed without proof that any particular seal is either counterfeit or impressed irregularly. Hence it is the duty of a judge to hold that a writing duly authenticated by a public seal is genuine unless the contrary is proved.

Whart. Ev., secs. 319, 321, 695.
United States *vs.* Amedy, 11 Wheat., 392.
Mangun *vs.* Webster, 7 Gill, 78.
Garnet *ex parte*, 7 Leg. Int., 174.
Robinson *vs.* Gilman, 20 Me., 299; R. S. Mo., 1879, sec. 1024.

The bond five being thus proven as well as confessed by the pleas to the second count, and also coupons 4, 5, 6, and 7 from said bond five described in the second count being confessed, the proof of execution of coupon three in first count from said bond five may be established by inspection and comparison with other coupons; and from the way it was cut from the bond and other inferences which a court or jury might properly draw from the facts in the case. Having found the fact this court will not interfere.

However, there is no *substantial* error in this, and under the laws of Missouri there must be error *materially* effecting the right of plaintiff in error to warrant a reversal of the judgment.

Page 237, Mo. Ann., pr. act., and cases cited.

Porter v Harrison
84 Mo. 822

Besides, none of these questions about failure of proof as to first count, fraud upon the jurisdiction of the court or that the judgment as finally rendered was a few dollars too much, was brought to the attention of the court below by motion for new trial or otherwise. These points must have been expressly raised and passed on by such motion to warrant a reversal.

Mo., pr. act., *supra*, sec. 3774, and cases.

Whittlesey, Mo. pr., 450 and 459.

Frances Wright Case 105 U.S. 381

There is no proof or offer of proof in deposition of Wm. Hill or otherwise that T. B. Hill, of St. Louis owned any of the bonds and coupons sued on at the time the suit was brought. The deposition of Wm. Hill is the only reference to T. B. Hill, and it was taken April 21, 1879 (page 218, printed record.) Mr. Hill, on page 217, says: "I do not own all these bonds *now*;" and than goes on to state who does.

On page 219 he says: "all the bonds I have given except Secor Gebhart & Stone, I purchased, *individually*, within the last three years. I bought them all after Judge Dillon's decision in the case of Thomas against Scotland County on coupons of same series of bonds."

The petition was filed January 4, 1878, more than a year before this deposition was taken, and there is no evidence that Mr. Hill did not own all of them at that time. So no question of fraud in the jurisdiction of the court is proven or offered to be proven.

Respectfully submitted,

A. J. BAKER and
F. T. HUGHES,
For Deft. in Error.